The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 24, Issue No. 4 July 2002

Robert F. Stephens
1927-2002

Attorney General
Chief Justice
Secretary of Justice
Statesman of the 20th Century

A Review of Criminal Laws of the 2002 General Assembly
KRS Chapter 31 Revised - HB 487
Liberty of Child Cannot Be Denied Unless Represented by Counsel - HB 146
DNA Test May Exonerate KY Defendant

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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR...

Ed Monahan

"I will fight for indigent defense until I die," proclaimed Robert F. Stephens to me at the reception after his portrait was hung in the Capitol. And indeed he did. DPA honors him for his support of defenders and also for his lasting influence on the Kentucky Criminal Justice system through his statesmanship.

Innocent Citizens. Are there innocent citizens in Kentucky's prisons? You bet. One of them is discussed in this issue, as the Kentucky Innocence Project is producing results.

Defender Bill. There was legislative action aplenty this year. Public Advocate Ernie Lewis summarizes the many laws that have changed and he summarizes the many changes to our defender statute. House Bill 487 has significantly changed KRS Chapter 31. This bill, sponsored by Rep. Kathy Stein with Rep. Jeff Hoover as the primary co-sponsor, and Rep. Jesse Crenshaw joining as co-sponsor, was legislation supported strongly by the Department of Public Advocacy. It makes significant changes and improvements to the enabling statute of the Department of Public Advocacy. The effective date of HB 487 is July 15, 2002

Fees and funding for DPA have changed. The state of revenue for indigent defense amidst changing legislation is reviewed. The KRS 31.051(2) administrative fee for the Department of Public Advocacy is abolished. HB 452 now provides that the Department of Public Advocacy will receive 3.5% of court costs, with a cap of $1.75 million. This replaced the KRS Chapter 31 administrative fee. HB 452 takes effect August 1, 2002. HB 452 states that "all court costs, fees, fines, and other monetary penalties assessed before this date but not collected or paid by this date shall be thereafter dispensed of in accordance with this Act."

Juvenile Liberty. And another significant piece of legislation that passed is HB 146 which insures that no judge can deny a juvenile his liberty unless the child is represented by counsel.

Discovery Fees. In *DPA v. Stephens*, No. 1998-CA-2500-MR et seq. (December 15, 2000)(not to be published), discretionary review denied December 12, 2001, the Kentucky Court of Appeals decided that prosecutors could not bill DPA or the KRS Chapter 31 special account fund for the costs of discovery provided to attorneys representing indigent defendants. This significant case is reproduced in this issue so the Bench and Bar can be informed about it.

Full Time defender offices. We reproduce maps indicating the major increase in counties covered by full-time defender offices. Completing the full-time system is within reach - read about it!

What do Kentuckians think? 8 out of 10 Kentuckians want defenders and prosecutors to have balanced resources. 3 out of 4 fear less resources for defenders leads to the risk of the innocent being convicted.

Touched by Greatness

Crit Luallen

Bob Stephens had a remarkable career and for those of us in public service, it was a career that we all can learn from and live by in many respects.

For example, Bob Stephens was appointed to Governor Paul Patton's Cabinet as Secretary of Justice at age 71 — when most people are slowing down and looking forward to any easy life in retirement. Stephens, however, tackled the job with the same gusto and commitment that propelled him to being one of, if not, the most influential political figures in the 20th Century.

Bob relished plunging into the Justice Cabinet job and learned every aspect of the cabinet's responsibility. This was the same devotion he showed throughout his career in becoming the longest-serving chief justice in the modern history of the Kentucky Supreme Court and the third longest serving in the nation. The same confidence and compassion convinced voters to elect him Fayette County Judge Executive and Kentucky Attorney General.

At the Justice Cabinet, he became an outspoken advocate for all of the programs of the agency and for the professionals who were under his command. Bob personally visited Corrections facilities, State Police posts, the Criminal Justice Training Center, and juvenile justice programs, and stayed in touch with workers, the administrators and the Kentuckians he served.

And when a vacancy occurred in the post of State Police Commissioner, he stepped in as Commissioner for a full year, adding hours to each day to personally direct that agency while conducting a national search for a new Commissioner.

When he took the secretary position, he told me that when he visited with good friends in retirement he could not imagine himself golfing or being idle. He would rather work at something meaningful until his last days. And that is what he did – literally directing legislative and budget strategy with his staff in the final days of his illness.

Throughout his career, Bob Stephens was a mentor to scores of young people who he took under his wing and coached along; I was one of them. We first met when I was a campaign worker at state headquarters when he was running for Attorney General in 1975. I was 23 years old, and he encouraged me to stay involved in public service. Our paths crossed time and again for the next 25 years.

When he was named Justice Cabinet Secretary by Governor Patton, Bob quipped with his ever-present humor that his career had come more than full circle as he was now working for a "gal" who stuffed envelopes in his first statewide race.

He said to me that first day of his cabinet appointment: "You know, I've never had a boss." I took that for what it was – a gracious yet clear message that quickly established the pecking order. I assured him that he would not have a boss here either. Governor Patton and I held him in such high esteem that we considered him an advisor, a mentor and a friend.

Each of us knows the times in our lives when we have been touched by greatness. I will always cherish the memories of this great man and honor those times I spent with him and learned and grew in his shadow.

Crit Luallen
Secretary, Governor's Cabinet

Chief Justice Robert Stephens - A Tribute

Robert L. Stephens lived a life fully immersed in the law and a life in which through the law he influenced Kentuckians and Kentucky history in a way few lawyers and jurists have ever approached. Finishing the law school at the University of Kentucky, Stephens served as a law clerk on the old Court of Appeals. Following that he served in a legal capacity in state government then a few years later as the County Judge (then both a sitting judge as well as county executive), as attorney general of Kentucky, then as an appointed and subsequently elected justice of the Kentucky Supreme Court. Of the 19 years he served on the Kentucky Supreme Court he served 16 years as its Chief Justice, the longest period of such service in Kentucky judicial history. When Chief Justice Stephens left the Supreme Court, Governor Patton appointed him as secretary of the Justice Cabinet where he served until his death on April 14, 2002.

I knew Bob Stephens best as Attorney General and as head of the Court of Justice when he was Chief Justice. I had the pleasure of briefly serving on his court for seven months during 1996.

Bob Stephens was a most effective advocate for the Court of Justice and extremely successful in securing appropriations for improvements in the justice system. His friendship with

and popularity among Kentucky legislators paved the way for legislative success for judicial improvements. As a practical politician he recognized that the perfect is the enemy of the possible and strove always to make the possible the best that it could be.

Author of the majority opinion in *Rose v. Council for Better Education*, one of the landmark cases in Kentucky constitution law, Stephens influenced the future of Kentucky and its educational system in a dramatic way which no writer of fiction could have conceived. He led the Kentucky Supreme Court in declaring unconstitutional all statutes regarding public education. This decision forced the Kentucky General Assembly to reestablish from scratch the entire system of public education in the Commonwealth. Such a decision from a less popular or respected court leader might have produced opposition and resistance leading to a confrontation between the legislative and judicial arms of government. To Bob Stephens credit it did not.

As a result of Chief Justice Stephens decision the General Assembly completely revolutionized the governance and nature of public education in Kentucky, bit the bullet on raising taxes, and provided the additional revenue required to support the new system. Without the decision which declared unconstitutional Kentucky's existing system of public education, these fundamental changes could not have occurred.

Chief Justice Stephens was a leader as well in streamlining the new court system whether it came from video recording of trials or the establishment of architectural standards for court buildings.

Bob Stephens has been described by current Chief Justice Joseph Lambert as the "principal architect of the modern Kentucky Court of Justice" Chief Justice Lambert described his predecessor as "Kentucky's John Marshall." All Kentuckians are indebted to Chief Justice Stephens for the positive leadership he brought to our state.

Walter Baker
Former Justice of Kentucky Supreme Court

Robert F. Stephens: An Outstanding Person

Bill Johnson

Bob Stephens was an outstanding public citizen and lawyer. He devoted most of his professional life to public service. Whatever project Bob undertook was well done. He was a man of great energy. He had a most charming personality. When you talked to Bob, he gave you complete attention. He was a great listener. As a result, he was able to understand the question or proposition and then clearly and concisely articulate a response. Bob was a very fair man. Despite serving as Attorney General of the Commonwealth and being the chief law enforcement officer, he never lost his sense of justice and a recognition that citizens accused also had substantial rights. He was an able administrator in both the executive and judicial branches of government. It was my great pleasure to serve with him on the Judicial Nominating Commission for judges of the Court of Appeals and Justices of the Supreme Court. Bob had a great sense of humor which he would use to make a point and create interest at the most serious of times. He recognized and detested injustice. He was a fair and just man, and we will sorely miss him.

Bill Johnson

Robert F. Stephens 1927-2002

Pamela Trautner

"*It is rare to have the opportunity to work with someone who truly leaves a legacy. Secretary Stephens was one of those remarkable individuals and we were all privileged to have worked with him. His personal style was never intimidating, and he always made you feel that your contribution was valuable.*"

— Stephanie Bingham, General Counsel,
Dept. of Criminal Justice Training.

"Whenever you dealt with Justice Stephens, he focused his attention on you. At that time you were the center of his universe."

— Steve Durham, General Counsel, Dept. of Corrections

Much has been written about Robert F. Stephens—about his lengthy career in public service, from Fayette County Judge Executive to the Kentucky Attorney General to Chief Justice of the Kentucky Supreme Court. He left an indelible mark at all levels of elected office demonstrated by his remarkable vision and leadership. He was the longest serving chief justice in the modern history of the Kentucky Supreme Court; the third

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longest serving in the nation. He is considered the architect of Kentucky's modern legal system by bringing video and other technology into the courtroom.

But to know the judge, truly was to love, respect and admire him. His enormous capacity for connecting on a personal level with literally thousands of people during his long and lustrous career in public service has been one of his most remarked upon qualities. He was overheard many times saying that he loved campaigning statewide so much, he actually gained weight during the campaign for attorney general.

Bob Stephens had a remarkable career and for those of us in public service, it was a career that we all can learn from and live by in many respects.

"He loved offering people unique opportunities," said Barbara Jones, deputy secretary of the Justice Cabinet. "Over the years it never ceased to amaze me how he could identify that certain quality in an individual and encourage them into the right professional niche. I have seen him 'spot' people time and time again and have heard many stories where he had a hand in a positive career development of many a successful individual."

Crit Luallen, secretary of the Governor's Executive Cabinet, remarked, "He was a mentor to scores of young people who he took under his wing and coached along; I was one of them. We first met when I was a campaign worker at state headquarters when he was running for attorney general in 1975. I was 23 years old, and he encouraged me to stay involved in public service."

"When he was named Justice Cabinet secretary, Bob quipped with his ever-present humor that his career had come more than full circle as he was now working for a 'gal' who stuffed envelopes in his first statewide race."

Kentucky Justice Cabinet

After almost 30 years in public service, Judge Stephens was considering retirement. However, at age 71 he accepted Governor Paul Patton's appointment as secretary of the Kentucky Justice Cabinet. He relished plunging into the Justice Cabinet job, learning every aspect of the cabinet and became an outspoken advocate for all of the programs of the agency and for the professionals who were under his command.

For example the staff of the Department of Juvenile Justice (DJJ) had the unique opportunity to embark on a great journey with Secretary Stephens, working as a new department under his leadership. While chief justice, Secretary Stephens had been instrumental in developing Kentucky Family Courts and the Court Designated Worker (CDW) Program. Because of his insight and true interest in reforming Kentucky's juvenile justice system, DJJ stands as a successful agency, devoting vast amounts of time and energy to the cause of rehabilitating our youth.

As chair of the Kentucky Criminal Justice Council, an ex officio role he assumed by virtue of being secretary of the Justice Cabinet, he embraced the council's systemic approach to issues and enthusiastically brought representatives of the criminal justice system to the table to develop workable solutions. He was especially excited about the council's assignment to undertake revision of the Kentucky Penal Code, a project he had hoped to oversee until its completion.

His presence, his vision and his leadership will be sorely missed.

Career Highlights

First appointed to the Kentucky Supreme Court in December 1979 and elected in 1980 to fill an unexpired term in the Fifth Supreme Court District, he was then re-elected for eight-year terms in 1984 and 1992. While serving an unprecedented four consecutive terms as chief justice (1982-98), he authored the historic opinion redefining Kentucky's educational system (*Rose v. Council for Better Education*). This decision, which propelled Kentucky to the forefront of national education reform, verified Robert Stephens' place as one of Kentucky's most prominent statesman and legal scholars.

As the Fayette County judge executive (1970-75), Robert Stephens tirelessly campaigned to reform Lexington and Fayette County's government structure to the urban county form of government, which has been vitally important to Fayette County. While serving as Kentucky Attorney General (1975-79), his professionalism ensured higher standards for that office while his compassion was reflected in his championing victims' causes.

Pamela Trautner
Department of Justice

Robert F. Stephens


John Bizzack

It would be easy to write out a list of accomplishments during the life of Robert F. Stephens. His contributions to the Kentucky court and criminal justice system are well known and left a well defined legacy of leadership.

My professional relationship with Judge Stephens began in the early 1970s and I was fortunate to be able to closely work with him in his final years. It is clear the Judge's career defined public service, but those who did not know him well or knew only of his accomplishments in the many positions he held, know only a part of his many skills and talents in dealing with people and issues.

In part, his legal training and experience in dealing impartially with the application of law helped make him the quintessential public servant in his field. However, it is more likely, his easygoing attitude, personal philosophies, and genuine concern and like for the people he met and worked with was at the root of his many successes.

The Judge found something good about everyone and every circumstance. He proved time and again the advantage of approaching people and issues with common courtesy and a smile.

I had a conversation with Judge Stephens a few months ago that illustrates his wonderful insight on the topic of achievement. He said that he thought it was important to happiness not to think about it too much, because, in his opinion, happiness is a by-product of a successful activity. He felt it was equally important to find what one could do best or a service most useful to others, then to do with all one's might. His last comment on the topic of achievement to me was especially poignant. He said that the person who does not read is no better off than the person who cannot read, and if a person does not continue to learn and grow as a person then they are no better off than one who cannot.

The Judge's career is full of examples of how attitude directly affects personal and public success. His ideas and the example he set during his life, and certainly his tenure as Justice Secretary will continue influence those fields and people he touched.

John W. Bizzack, Commissioner
Department of Criminal Justice Training

Dedicated Leadership

I was fortunate enough to first meet Justice Stephens during his visit to my senior Civics class at Lafayette in 1973. It was especially appropriate that Mr. Stephens, who personifies the textbook definition of "public servant," would appear at the class that most influenced my worldview as well as my future decision to attend law school.

His dedication to the city, and at that time his leadership in creating the merged urban-county government, impressed me very much. In fact, it was the first time I began to see that anybody other than a football star could be a "hero."

My next contact with Justice Stephens came 26 years later during our joint service on the *Blue Ribbon Group* to improve the state of Public Defense in Kentucky. Consistent with his long career of seeking and doing justice he devoted his leadership to the dire need for adequately funding our Public Defenders.

Thanks to him, as well as the tireless efforts of Ernie Lewis and the rest of our team, the legislature and Governor Patton significantly increased funding for Public Defense. While we were most appreciative, I was disappointed that it wasn't as much as we had asked for—and truly needed.

I expressed as much to Justice Stephens at an event just after the Governor's budget was set. He said, "Richard, you don't realize just how far we came!" He went on to explain that at the beginning he spoke with Governor Patton about the problem and the 3 to 1 funding disparity between Prosecutors and Public Defenders.

To this, Governor Patton replied (and I paraphrase) "You're right, Bob, the Prosecutors are at an awful disadvantage!" Indeed, perhaps the funding increase is as much a testament to Governor Patton's flexibility as it is a fitting tribute to Justice Stephens.

Richard F. Dawahare

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A Champion for Individual Rights

As I begin the daunting task of writing about Robert Stephens' contributions to the advancement of Kentucky's criminal justice system, I cannot even believe that I am doing it! I was fortunate and blessed to have been able to serve as his law clerk and intern during his tenure as Chief Justice of the Kentucky Supreme Court. Now working as a staff attorney with the Department of Public Advocacy, I have witnessed, first-hand, the remarkable advancements attributable to Stephens from appellate courtrooms to district courtrooms throughout our state.

During his time with us, "The Chief" or "CJ," as I knew him, worked tirelessly to improve Kentucky's criminal justice system and make it more accessible to the citizens of Kentucky. While Attorney General for Kentucky from 1975 to 1979, Stephens set about redesigning Kentucky's prosecutorial system by uniting Commonwealth's Attorneys throughout the state under the umbrella of the attorney general's office. He further helped in getting a constitutional amendment passed which reorganized Kentucky's court system into four parts: Supreme Court, Court of Appeals, circuit courts, and district courts.

In 1979, then-Governor Julian Carroll appointed Stephens to the Kentucky Supreme Court. Upon his election as Chief Justice, Stephens began the daunting task of modernizing Kentucky's courts. Stephens was frequently seen during the legislative session of the Kentucky General Assembly, lobbying for legislative appropriations to help improve the court system. Many of the technological advancements many of us enjoy in the courtroom today were brought about through his efforts. Under Stephens, Kentucky became the first state in the nation to install cameras in its courtrooms, doing away with court reporters. This ultimately helped to improve the efficiency of getting the record of a case to Frankfort, eliminating long delays in criminal and civil appeals. Today, Kentucky's video record system is hailed as a model throughout the United States.

Further, Chief Justice Stephens played a pivotal role in obtaining funding from the Legislature to rehabilitate old courthouses and to build new ones across the state. These new facilities have given Kentucky lawyers and judges state-of-the-art courtrooms in which to practice and have been beautiful additions to their communities.

It can go unnoticed that Stephens authored many landmark decisions while serving on the Court. The decision he seemed most proud of was *Rose v. Council for Better Education*, which declared Kentucky's public schools unconstitutional and propelled the state to the forefront of national education reform. He was also proud of *Commonwealth v. Wasson*, which struck down the state law forbidding sodomy between consenting adults.

While Stephens authored numerous other important opinions, his decisions in criminal cases shared a common thread; He championed the rights of victims and defendants, alike. He compassionately considered each and every case that came through his office to ensure that the end result was just and fair. Upon his retirement from the Kentucky Supreme Court in 1999, Stephens had served 19 ½ years, 16 of which he served as Chief Justice. This made him the longest serving Chief Justice in Kentucky's history, and the third-longest in the nation.

Those of us who work in the Department of Public Advocacy also have Bob Stephens to thank for his tireless effort to help us, and those we represent, by serving as co-chairman of the Kentucky *Blue Ribbon Group on Improving Indigent Defense in the 21st Century*. Through his hard work and leadership, our department was able to get funding from the Governor and Kentucky General Assembly to increase our salaries, retain more attorneys, reduce our caseloads, and establish a full-time public defender system. We have all experienced a better working environment and are able to provide better representation to our clients because of him.

If it is not obvious, yet, The Chief always wanted to do the "best" for Kentucky, and for *everyone* concerned in the criminal justice system. He strove for excellence! He was always an encourager with a bright vision of the future. That he has now passed from our midst is such a loss, not only to those like me who knew him and cared about him, but also to our Commonwealth. We all owe him a debt of gratitude for his tremendous advancement of Kentucky's criminal justice system and for making our difficult jobs, a little bit easier.

Evelyn Gee
Department of Public Advocacy

THE CJ WILL BE MISSED

Everyone who has encountered Robert F. Stephens, forever the CJ to many of us, has a memory of him. He did not sleepwalk through life. He seemed to rip and roar through it, and if you met him along the way, you were changed by that meeting.

I could think of many such encounters with him. I could relate how gently he treated me as a young lawyer appearing in front of him to argue a case before the Supreme Court. I could talk about talking with him outside a committee room as he was preparing to testify before the Senate Judiciary Committee on behalf of a law to prohibit racial profiling. I could relate how he repeatedly disarmed a particular prosecutor at the Kentucky Criminal Justice Council, whose divide and conquer tactics were no match for the CJ's affability, good humor, and occasionally pointed expressions. Each of these demonstrates a side of the CJ.

I would prefer to talk about 3 special times. The first occurred in the summer of 1997 at the Annual Conference for the Department of Public Advocacy. I had named the CJ a recipient of the Public Advocate's Award for his many contributions to the Kentucky Court of Justice, including his support of indigent defense. I presented to 300+ defenders all of the things that I believed he had done for indigent defense. When he came up to the front to receive the award, he gave me an enthusiastic bear hug. Not being a particularly huggy type, and having never hugged a chief justice, I was taken a bit aback. But at some point it occurred to me that he genuinely appreciated being honored by public defenders. He believed in what we did. And he was happy that he was being recognized for what he had done for indigent defense over the years. Here was a giant of a man, a man whom Governor Patton has said is **the statesman** of the 20th Century in Kentucky, the author of KERA, the architect of the Kentucky Court of Justice, being excited by his recognition for contributing to indigent defense. He certainly recognized the importance of education, having a healthy court system, reforming the governmental structure of Fayette County, among other projects. At the same time, he was willing in his busy life to see down to the poor people in our court system, to see that they needed attention also, to see that if they did not receive justice, then none of us did.

Turn the clock to June 1999. Judge Stephens, now the Secretary of Justice, was serving as co-chair with former Rep. Mike Bowling of the *Blue Ribbon Group on Indigent Defense*. He had heard evidence that the Department of Public Advocacy needed $11.7 million additional General Fund dollars if indigent defense in Kentucky was to rise from the floor of the nation to the middle. He was well aware that the 2000 budget was not one that was flush, and that $11.7 additional dollars would be hard to come by. But on that day in June 1999 Judge Stephens said "let's go for it." He advocated asking for the full amount. He knew that the time was right to reform indigent defense in Kentucky, that the Governor was receptive to significant improvement, and his was the voice of reform rather than caution. He put indigent defense on the map of Kentucky, lending his immense stature to an issue that is normally difficult for which to advocate. As I spoke with powerful legislators throughout the state in the 2000 General Assembly, the fact that Bob Stephens had chaired the *Blue Ribbon Group* opened more doors than I could have imagined.

Members of the Blue Ribbon Group co-chaired by Robert F. Stephens

A final memory occurred in his office in the Justice Cabinet, in the late summer of 2002. I came to him to ask him whether he believed we should convene the *Blue Ribbon Group* again to update that group on the state of indigent defense prior to the 2002 General Assembly. We had received $6 million in FY01, leaving $5.7 million to complete all of the *Blue Ribbon Group* recommendations. Bob had already been diagnosed with the disease that would kill him. He was in the office, declining to leave the work to which he had committed. He wanted to talk about the *Blue Ribbon Group*. He said we should convene, that we should ask for the full amount again, that we would never receive it if we didn't ask for it. We agreed, and I acted based upon his advice. However, we also talked about his illness, and about living a full life, and about faith. I learned much during that brief time. I learned of keeping commitments. I learned of thinking about the least of these even in the direst of times. And I glimpsed how a truly great man was facing death. I will never forget that late summer afternoon, or the great man whose strength filled that room. ■

Ernie Lewis
Public Advocate

CRIMINAL JUSTICE LEGISLATION OF THE 2002 GENERAL ASSEMBLY

Ernie Lewis, Public Advocate

PUBLIC DEFENDERS

House Bill 487

This bill is basically a rewrite of KRS Chapter 31. Among the changes made by this statute are the following:

- The enabling statute for the Department of Public Advocacy, KRS Chapter 31, has been reorganized, with like sections placed together in a more rational manner. This is particularly apparent in the organizational section describing the various plans for delivery of trial-level services.
- The Public Advocacy Commission has altered membership to comply with case law. Two members previously appointed by the Speaker of the House and the President Pro-tem of the Senate are replaced by the Executive Director of the Criminal Justice Council and a child advocate to be appointed by the Governor. Commission members will receive $100 per day for each meeting attended.
- P&A language has been altered to make the statute consistent with additional enabling federal legislation.
- The Department is authorized to purchase liability insurance to cover attorneys with whom the Department contracts, including attorneys in part-time counties as well as those on conflict contracts with individual DPA offices.
- The statute clarifies that status offenders are eligible to be appointed a public defender.
- Children who are presently represented by the Juvenile Post-Dispositional Branch pursuant to the *MK v. Wallace* Consent Decree are now defined as eligible for public defender services. Those who are "residing in a residential treatment center or detention center" are entitled to be represented whether needy or not "on a legal claim related to his or her confinement involving violations of federal or state statutory rights or constitutional rights."
- The eligibility standard has been altered considerably. The previous prima facie standard has been eliminated. The judge now must look at all factors to determine eligibility. The list of factors has been expanded to include "source of income," "number of motor vehicles owned and in working condition," "other assets," "the poverty level income guidelines compiled and published by the United States Department of Labor," "complexity of the case," "amount a private attorney charges for similar services," "amount of time an attorney would reasonably spend on the case," and "any other circumstances presented to the court relevant to financial status."

- The affidavit of indigency has been altered to include a variety of benefits that he/she may be receiving. It also explicitly informs the person that he understands that "he or she may be held responsible for the payment of part of the cost of legal representation."
- KRS 31.185 is amended to read that a public defender may request to be "heard ex parte and on the record with regard to using private facilities."
- The previous "recoupment" fee is now referred to as a "partial fee." The partial fee is now converted to a "civil judgment subject to collection." Partial fees continue to be returned to the county where the county has selected a plan; in all those counties where there is a full-time office run by the state, the partial fee returns to the Department.
- The administrative fee of KRS 31.051 is abolished, replaced in HB452 by being included in court costs.

SEX OFFENSES

Senate Bill 25

This bill includes GHB and flunitrazepam in both the trafficking and possession portions of KRS 218A, covered below. In addition, the following changes are included in the sex offense statutes:

- Rape and sodomy in the second degree are expanded to include engaging in sexual intercourse, or deviate sexual intercourse, with someone who is "mentally incapacitated." This was previously included in the rape and sodomy in the third degree statutes.
- Sexual abuse in the first degree is expanded to include making sexual contact with someone who is incapable of consent because they are mentally incapacitated. This was previously included as sexual abuse in the second degree.
- Sexual abuse in the first degree previously contained the element that someone is guilty if they subject another person to sexual contact who is incapable of consent because they are "physically helpless." The "physically helpless" definition is expanded to include "a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug."

Senate Bill 227

This bill expands the crimes of third degree rape, third degree sodomy, and second degree sexual abuse to include the sexual intercourse or sexual contact (in the case of sexual abuse) by someone over 21 with someone under 18 "and for whom he provides a foster family home."

House Bill 310

A new crime called video voyeurism is created in KRS Chapter 531, with the following features:

- The crime is defined as using "any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, or nipple of the female breast of another person without that person's consent."
- The crime also requires the using of the image for consideration or the distribution of the image "by live or recorded visual medium, electronic mail, the Internet, or a commercial on-line service."
- The statute does not apply to the "transference of prohibited images by a telephone company, a cable television company" or similar agencies.
- Video voyeurism is a Class D felony.

House Bill 133

A crime called voyeurism is created in KRS Chapter 531 making it unlawful to trespass and observe sexual conduct or nudity, with the following features:

- The primary definition is the same as video voyeurism.
- The crime is distinguished from video voyeurism by the omission of the requirement that the image be used, divulged, or distributed.
- Voyeurism includes the entering or remaining unlawfully "in or upon the premises of another for the purpose of observing or viewing the sexual conduct, genitals, or nipple of the female breast of another person without the person's consent."
- To constitute voyeurism the victim must be in a place "where a reasonable person would believe that his or her sexual conduct, genitals, or nipple of the female breast will not be observed, viewed, photographed, filmed, or videotaped without his or her knowledge."
- Voyeurism is a Class A misdemeanor.

KIDNAPPING AND VIOLENT OFFENDER

Senate Bill 26

This bill has two significant provisions:

- Kidnapping is expanded to include under KRS 509.040, the deprivation of the "parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor…"
- The violent offender statute, KRS 439.3401, is expanded to include persons convicted of robbery in the first degree and burglary in the first degree when "accompanied by the commission or attempted commission of a felony

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sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040…" Thus, first degree burglary during the commission of first degree and second degree assault, or during the commission of a third conviction of fourth degree domestic assault, or during the commission of wanton endangerment in the first degree, is now a violent offense.

- There is a curious provision stating that the violent offender expansion as it pertains to robbery in the first degree "shall apply only to persons whose crime was committed after the effective date of this Act." The implication is that the expansion of violent offender to burglary in the first degree is not so limited. If this portion of the bill were applied to those whose crimes were committed prior to July 15, 2002, this would be open to challenge.
- The application of violent offender to burglary in the first degree is also open to challenge under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d. 435 (2000) due to there being no provision for the jury making the factual determination.

DNA

House Bill 4

This is a significant piece of legislation that both expands the DNA database and ensures that samples are preserved. Among its provisions are the following:

- Persons already sentenced to death may request DNA testing and analysis of an item that may contain biological evidence related to the investigation or prosecution. The Court must order testing and analysis if a reasonable probability exists that the person would not have been prosecuted if results of testing had been exculpatory, and if the evidence can still be tested and was not previously tested. The Court may order testing and analysis if a reasonable probability exists that the person's verdict or sentence would have been more favorable with the results of the DNA or that the results will be exculpatory. If the Court orders testing and analysis, appointment of counsel is mandatory. If the sample has been previously tested, both sides must turn over underlying data and lab notes. Once a request is made, the Court must order the Commonwealth to preserve all samples that may be subject to testing. If the results are not favorable to the person, the request or petition must be dismissed. If the results are favorable, "notwithstanding any other provision of law that would bar a hearing as untimely," the Court must order a hearing and "make any further orders that are required."
- When a person is accused of a capital offense, either the Commonwealth or the defense may move for a sample to be subject to DNA testing and analysis. The testing is to be done at a KSP laboratory or a laboratory selected by the KSP. Up to 5 items may be tested with the costs to be borne presumably by the lab; testing of additional items "shall be borne by the agency or person requesting the testing and analysis."
- The DNA database is expanded to include persons convicted of or attempting to commit unlawful transaction with a minor in the first degree, use of a minor in a sexual performance, promoting a sexual performance by a minor, burglary in the first degree, burglary in the second degree, and all juveniles adjudicated delinquent for these offenses. The database is also expanded for all persons convicted of capital offenses, Class A felonies, and Class B felonies involving "the death of the victim or serious physical injury to the victim."
- Items of evidence that may be subject to DNA testing may not be disposed of prior to trial unless the prosecution demonstrates that the defendant will not be tried, and a hearing has been held in which the defendant and prosecution both have an opportunity to be heard.
- Items of evidence that may be subject to DNA testing may not be disposed of following a trial unless the evidence has been tested and analyzed and presented at the trial, or if not introduced at trial an adversarial hearing has been held, or unless the defendant was found not guilty or the charges were dismissed after jeopardy attached and an adversarial hearing was conducted. The burden of proof for the destruction of samples will be upon the party making the motion.
- Destruction of evidence in violation of this statute is a violation of the tampering with physical evidence statute (KRS 524.100).
- Evidence must be retained "for the period of time that any person remains incarcerated in connection with the case" unless there has been a hearing and an order to destroy the evidence.
- The statute is effective on July 15, 2002. However, an elaborate implementation date mechanism is included in the statute that allows expansion of the database as funding becomes available.

JUVENILE JUSTICE

The Department of Juvenile Justice succeeded in passing three pieces of agency legislation, all of which had been previously introduced unsuccessfully.

House Bill 144

This bill makes a variety of significant changes in juvenile law, including:

- The Juvenile Justice Advisory Board and Juvenile Justice Advisory Committee are made into one board with newly constituted membership.

- The consent decree of *MK v. Wallace* is memorialized into KRS 15A.065. This requires DJJ "in cooperation with the Department of Public Advocacy" to develop a "program of legal services for juveniles committed to the department who are placed in state-operated residential treatment facilities and juveniles in the physical custody of the department who are detained in a state-operated detention facility, who have legal claims related to their confinement involving violations of federal or state statutory or constitutional rights."
- DJJ employees will be able to give depositions rather than personal testimony in civil cases arising out of their employment; however, "if the court in which the civil action is pending finds that the witness is a necessary witness for trial, that court may order the personal attendance of the witness at trial."
- No child 10 or under may be placed in a DJJ facility or a juvenile detention facility unless charged with a Class A, Class B, or capital offense when there are less restrictive alternatives available.
- Detention costs may be assessed against a parent when a hearing has been held and it has been determined that the child has a previous specific record and that the "failure or neglect of the parent to properly supervise or control the child is a substantial contributing factor of the act or acts of the child upon which the proceeding is based" and that the parents have the ability to pay.
- Eliminates the need for an administrative hearing when a committed child escapes from custody. Children who escape or are absent without leave from placement are to be returned to active custody of DJJ within three days.
- Establishes a limited privilege for communications during diagnosis and treatment by an offender and a member of his family with a DJJ employee or other treatment provider, unless the offender consents or unless the communication "is related to an ongoing criminal investigation." Further exceptions to the privilege include communications to determine "whether the sexual offender should continue to participate in the program," to conduct in which the offender was not a participant, and to "any disclosure involving a homicide."
- Youthful offenders may remain in DJJ custody until they are 21 after DJJ consults with the Department of Corrections. This placement may end if the offender "causes any disruption to the program or attempts to escape." When the youth turns 21 he is transferred to DOC. A retained youthful offender may, after serving 12 months additional time, petition on one occasion for reconsideration of probation and early parole so long as he is not a violent offender under KRS 439.3401.

House Bill 145

This is primarily a piece of clean-up legislation with some of the following features:

- DJJ is given the authority to decertify county-run juvenile detention facilities.
- Children convicted of traffic offenses are to spend their time of confinement in a juvenile facility until they turn 18, and thereafter in an adult detention facility.
- Children subject to the automatic transfer for use of a firearm under KRS 635.020(4) shall be returned at the age of 18 to the sentencing court for an 18-year old hearing consistent with KRS 640.030(2).
- DJJ is required to provide a child's offense history to the superintendent of the local school district where the child is placed.
- The right to treatment includes the right to "have that treatment administered in the county of residence of the custodial parent or parents or in the nearest available county."

House Bill 146

This is a bill that addresses the issue of the absence of counsel that has been predominant, with the following features:

- All children who are charged with a felony or a sex offense must be represented by counsel.
- The court may not deny any child's liberty unless they are represented by counsel.
- Children outside the mandatory counsel provisions must still be represented by counsel unless they waive counsel at a hearing where specific findings of fact are entered indicative of a knowing and intelligent and voluntary waiver.

CHILD SEXUAL ABUSE

House Bill 393

This bill makes a number of changes to the law pertaining to "children's advocacy centers" as well as the following important provisions for lawyers defending a person accused of child sexual abuse:

- Employees of children's advocacy centers are given immunity from civil liability "arising from performance within the scope of the person's duties."
- The files, reports, and other documents are made confidential outside of Cabinet, law enforcement, prosecutors, medical professionals and the court. The records may also be disclosed pursuant to a court order. Significantly, this change "shall not be construed as to contravene the Rules of Criminal Procedure relating to discovery."
- An interview of a child "shall not be duplicated except that the Commonwealth's or county attorney prosecuting the case may make and retain one copy of the interview and make one copy for the defendant's counsel that the defendant's counsel shall not duplicate."
- The copy of the interview with the child must be turned over to the court clerk at the close of the case.
- All recorded interviews that are introduced into evidence or are in the possession of the children's advocacy center,

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law enforcement, the prosecution, or the court, must be sealed unless the sealing is objected to by the victim.

- The provisions pertaining to the copies of the recorded interviews also contain the proviso that they "shall not be construed as to contravene the Rules of Criminal Procedure relating to discovery."

CONTROLLED SUBSTANCES

House Bill 26

This bill requires the Governor's Office of Technology to submit a drug diversion grant to "fund a pilot project to study a real-time electronic monitoring system for Schedules II, III, IV, and V controlled substances" in two rural counties.

House Bill 644

This bill creates two new methamphetamine crimes. It creates the crimes of possession of a methamphetamine precursor and distribution of a methamphetamine precursor, with the following features:

- The elements of possession of a methamphetamine precursor crime are the knowing and unlawfully possession of a "drug product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as a precursor to methamphetamine or other controlled substance."
- Possession of the product "containing more than twenty-four (24) grams" is "prima facie evidence of the intent to use the drug product as a precursor…"
- Possession of a methamphetamine precursor is a Class D felony for the first offense and Class C felony for each subsequent offense.
- The unlawful distribution of a methamphetamine precursor is defined as the knowing selling, transferring, distributing, dispensing, or possessing with the intent to sell, transfer, distribute, or dispense any of the methamphetamine precursors. This offense is a Class D felony for the first offense, and Class C felony for the second offense.

Senate Bill 25

The trafficking in a controlled substance statute, KRS 218A.1412, is expanded to include "gamma hydroxybutyric acid (GHB) and flunitrazepam. Likewise, GHB and flunitrazepam are included in KRS 218A.1415, possession of a controlled substance in the first degree. There are other provisions to this bill that are covered in the Sex Offender portion of this outline.

DOMESTIC VIOLENCE

House Bill 428

This bill amends KRS 508.130 to provide for a permanent restraining order for stalking victims, with the following other features:

- Creates an assumption of an application for a restraining order application upon a conviction of either first or second degree stalking.
- A hearing is held on the application unless the defendant waives it.
- The hearing is to be held "at the time of the verdict or plea of guilty." This is a curious section, since the verdict operates as an application for a restraining order.
- The Court may in the restraining order prohibit the defendant from entering the residence, property, school, or play of employment of the victim, as well as making contact with the victim personally or through someone else. The order is required to "protect the defendant's right to employment, education, or the right to do legitimate business with the employer of a stalking victim as long as the defendant does not have contact with the stalking victim."
- The restraining order "shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim…"
- The restraining order "shall not operate as a ban on the purchase or possession of firearms or ammunition by the defendant" unless he has been convicted of a felony, i.e. stalking in the first degree.
- The restraining order lasts in the discretion of the court, but may not last longer than 10 years.
- A violation of the restraining order constitutes a Class A misdemeanor.
- An officer with probable cause that the defendant has violated a restraining order may arrest without a warrant even where the violation has not occurred in the presence of the officer.

Senate Bill 89

This bill requires the Justice Cabinet to make a reasonable effort to notify the petitioner who obtained a domestic violence order that the respondent has attempted to purchase a firearm.

THIRD DEGREE ASSAULT

House Bill 333

This bill expands the protected group of those included in third degree assault to "transportation officer appointed by a county fiscal court …to transport inmates when the county jail or county correctional facility is closed while the transportation officer is performing job related duties." This remains a Class D felony.

Senate Bill 80

This bill also expands third degree assault to include teachers and school employees who are "acting in the course and scope of the employee's employment," and school volunteers who likewise are acting within the "scope of that person's volunteer service."

FINANCIAL FRAUD

House Bill 79

This bill makes a variety of additions to mostly KRS Chapter 434, including some of the following:

- The bill makes it unlawful to obtain or cause to be disclosed "financial information from a financial information repository by knowingly" making false statements to an employee or customer of the "financial information repository" with the intent to deceive. This is a Class D felony.
- The bill creates the crime of "trafficking in financial information," defined as "manufactures, sells, transfers, or purchases, or possesses with the intent to manufacture, sell, transfer, or purchase financial information for the purpose of committing any crime." This is a Class C felony.
- KRS 514.160, the theft of identity statute, and KRS 514.170, the trafficking in stolen identity statute, are altered to make some technical changes.

COMPUTER FRAUD

HB 193

This bill makes a variety of changes to the computer fraud statute, KRS 434.840-434.860, including some of the following provisions:

- The definitions of computer, computer network, computer program, computer software, computer system, device, intellectual property, are modernized.
- The owner of a computer is defined as the person "who has title, license, or other lawful possession of the property, a person who has the right to restrict access to the property, or a person who has a greater right to possession of the property than the actor."
- "Acting without the effective consent of the owner" is added as an element to unlawful access to a computer in the first and second degree. "Effective consent" is defined as "consent by a person legally authorized to act for the owner." Conditions rendering the consent ineffective are listed, including deception, coercion, age, mental disease or defect, or intoxication.
- Unlawful access to a computer in the second degree is altered to include as elements that the person acts without the effective consent of the owner, and that the actions result "in the loss or damage of three hundred dollars (300) or more." Unlawful access to a computer in the second degree is raised from a Class A misdemeanor to a Class D felony.
- The crime of unlawful access in the third degree is created. The elements are the same as unlawful access in the second degree, other than the damage resulting, which is under $300. Unlawful access in the third degree is a Class A misdemeanor.
- The crime of unlawful access in the fourth degree is created as a Class B misdemeanor. It is defined similarly to third degree unlawful access with no damage or loss resulting.

FLEEING OR EVADING POLICE

House Bill 193

This bill, which is covered above under computer crime, also amends KRS 520.100, fleeing or evading police in the second degree, to include flight by pedestrians, with the following elements:

- Intent to elude or flee
- Person knowingly or wantonly disobeys a direction to stop.
- Direction to stop is given by a person recognized to be a peace officer.
- Peace officer must have an articulable reasonable suspicion that a crime has been committed by the person fleeing.
- The person by fleeing or eluding causes or creates a substantial risk of physical injury to any person.

PAROLE

House Bill 93

This bill amends KRS 197.170 by requiring that when a prisoner is released from custody, the warden of the institution must notify the Circuit Court, Commonwealth's Attorney, and Sheriff of the County where the defendant was sentenced.

House Bill 142

This bill amends KRS 439.340 allowing the victim to waive notice of consideration for parole after the initial consideration.

Senate Bill 222

This bill allows the Parole Board to parole prisoners who are wanted as a fugitive by other jurisdictions, requiring them to release the prisoner to a detainer from another jurisdiction. The release is not a "relinquishment of jurisdiction"; thus, the prisoner may be returned for parole violation.

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JURORS

House Bill 781

This bill amends KRS 29A in a variety of ways, including:

- The bill expands the master list of prospective jurors in KRS 29A.040 to include those persons "filing resident individual income tax returns." Persons with valid driver's licenses and persons registered to vote in the county are retained on the master list. AOC merges the three lists to create one master list of persons eligible for jury service.
- The procedure previously outlined in KRS 29A.060 for selecting grand and petit jurors is deleted.
- The persons who may determine juror disqualification from the face of the jury qualification form is expanded from just the Chief Circuit Judge or his designee to other judges of the court, the court's clerk, a deputy clerk, the court's administrator, or a deputy court administrator designated by the Chief Circuit Judge.
- KRS 29A.100 is amended to allow the same group of individuals as above to excuse a juror from service for up to 10 days, or postpone jury service for 12 months, based upon individual circumstances. The reason for the excuse or postponement must be listed on the juror qualification form.
- Persons who have received a "restoration of civil rights" are explicitly made eligible to serve on a jury.
- The Chief Circuit Judge may grant a "permanent exemption" based upon a "permanent medical condition rendering the individual incapable of serving."
- The Chief Circuit Judge or the trial judge may not only excuse a juror from service but also may reduce the number of days of service, or postpone service for a period of up to 24 months.
- A person may not be called as a juror more than 1 time in a 24-month period, expanded from 12 months. This includes service as a juror in federal and other state court.

INTIMIDATING A PARTICIPANT IN THE LEGAL PROCESS

House Bill 571

This bill makes major changes to KRS 524, adding persons who may not be intimidated, and increasing penalties, including the following:

- KRS 524.040 changes "intimidating a witness to "intimidating a participant in the legal process." The crime is expanded to include the use of physical force or a threat against a person he believes "to be a participant in the legal process," or influencing or attempting to influence the testimony, "vote decision, or opinion" of the person. The act must be "related to the performance of a duty or role played by the participant in the legal process." The crime of intimidating a participant in the legal process remains a Class D felony.
- Protected persons include current judges or justices, trial commissioners, former judges or justice or trial commissioner, prosecutors, defense attorneys, jurors, witnesses, and the "participant's immediate family."
- The previous crime of "tampering with a witness" has the penalty raised from a Class A misdemeanor to a Class D felony.
- Jury tampering has been made a Class D felony; it was previously a Class A misdemeanor.

INMATE LAW SUITS

House Bill 86

This bill is a Department of Corrections Bill containing numerous sections related to inmate lawsuits and sentencing, including the following:

- Inmates must exhaust administrative remedies prior to bringing an action related to a disciplinary proceeding, a challenge to a sentence calculation, or a challenge to custody credit.
- Any law suit arising out of a detention facility disciplinary proceeding based upon either federal or state law must be brought within 1 year after the cause of action accrued. The date of accrual is the date "an appeal of the disciplinary proceeding is decided by the institutional warden."
- Inmates are limited in the number of law suits they may bring without paying the filing fee to 3 within a 5 year period of time if those lawsuits were "dismissed on the grounds that it is frivolous, malicious, or harassing, unless the prisoner is under imminent danger of serious physical injury, without paying the entire filing fee in full."
- Department of Corrections officers and employees may have their deposition taken rather than their personal attendance required during a lawsuit, unless the court otherwise finds that the witness' personal attendance is necessary for the trial.
- Department of Corrections records related to supervision, custody, or confinement, medical charts or records may be proved by copy rather than personal testimony.
- KRS 532.110 regarding concurrent and consecutive terms of imprisonment is amended to state that when there is a silent judgment, the sentences shall run concurrently unless the provisions of KRS 532.110(3) or KRS 533.060 apply. This provision reconciled previously inconsistent statutes.
- Department of Corrections sex offender treatment is regulated by the Department of Corrections under KRS 197.400-197.440 rather than KRS 17 related to sex offender registration.

DRIVER'S LICENSES

House Bill 188

This bill changes significantly the requirements for obtaining drivers' licensing in Kentucky. It is a complex statute with many provisions, including the following provisions:

- A person with a driver's license from another state who becomes a Kentucky resident, defined as establishing "Kentucky as his or her state of domicile" who is a licensed driver must apply for a Kentucky license within 30 days of establishing residency.
- Before issuing a driver's license to a new Kentucky resident, the clerk must verify whether the person's license has been revoked in another state.
- A person who is not a US citizen but who has been granted permanent resident status obtains a license in the same manner as if he were a US citizen.
- A person who is neither a US citizen nor a permanent resident applies for a driver's license from the Transportation Cabinet. The application must be accompanied by particular documents depending upon the status of the person. If the Transportation Cabinet decides that the person should be issued a driver's license, the person takes an official form given by the Cabinet to the circuit clerk who then reviews the person's documentation and the official form.
- The statute makes changes to the procedure for obtaining a "nondriver's identification card," making it consistent with the procedures for obtaining a driver's license.
- A person may drive with another state's driver's license for a period of 1 year after entering Kentucky. A college student is exempted from this requirement. A person who is not a citizen may drive for up to one year with his domestic license.

House Bill 652

This bill allows for the use of ignition interlock devices in lieu of parts of license revocations and suspension periods, including some of the following provisions:

- A person who has had their license revoked for having committed DUI 2nd, 3rd, or 4th, may move the court to reduce the revocation period by half, and in no case less than 12 months. The Court may grant the motion so long as the person does not drive without an ignition interlock device, so long as the person drives only under the conditions set by the court, and so long as the person has an ignition interlock device installed on their car.
- A person who has been convicted of driving while his license is revoked or suspended for a DUI, 2nd or 3rd offense, may after 1 year of revocation move the Court to be allowed to drive with an ignition interlock device for the remaining period of revocation.
- The Court shall dissolve the order upon finding a violation of the conditions. If violated, the person receives no credit toward his violation period.

COURT COSTS

House Bill 452

This is the Court Costs Bill that came through the Kentucky Criminal Justice Council as a result of work done by the subcommittee of the Council's Penal Code Committee. It establishes one court cost of $100 in criminal cases both in circuit and district court, with these other provisions:

- Court costs are mandatory subject to "nonimposition" only if the "court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." If the defendant does not meet the standard but still is unable to pay, the court must set a show cause date for the full payment. The court may establish an installment payment plan for the payment of the court cost, fees, and fines, which must be paid within 1 year of sentencing. This requirement is irrespective of responsibilities for paying restitution and "other monetary penalties."
- Money received during the year installment plan are to be applied "first to court costs, then to restitution, then to fees, and then to fines."
- The $100 court cost is imposed whether the offense is prepayable or not. Parking fines that are prepaid do not carry a court cost.
- Court costs require a conviction.
- The KRS 31.051(2) administrative fee for the Department of Public Advocacy is abolished.
- A Court Cost Distribution Fund is created. Court costs are sent to the Finance and Administration Cabinet, which makes monthly disbursements of the fund to various entities. The Department of Public Advocacy receives 3.5% up to a cap of $1,750,000. The Crime Victims' Compensation Board receives 3.4% with a cap of $1,700,000. The Kentucky Local Correctional Facilities construction Authority receives 10.8% up to $5,400,000. .7% up to $350,000 goes to the Justice Cabinet for Brady Act records checks and "for the collection, testing, and storing of DNA samples." 5.5% goes to the county to pay for the costs of the operation of the county jail and for the transportation of prisoners..
- Numerous other costs are no longer paid through the circuit clerk but are paid directly to the entity, such as the Natural Resources and Environmental Protection Cabinet, statutorily authorized to receive the particular damage assessment.
- The fees assessed for the crime victims' compensation fund, the spinal cord and head injury research trust fund, and the traumatic brain injury trust fund are abolished and replaced with court costs.

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- The trial court may order a fine, forfeiture, service fee, cost or other monetary penalty to be paid to a person other than the circuit clerk. When that occurs, the order is a judgment.
- The trial court may order the defendant's employer to deduct money from the defendant's wages to pay for his board, transportation costs, support of his dependents, or other obligations. These payments are not to be paid to the clerk.
- Costs for lodging in a halfway house or other facility are to be paid to the facility.
- Restitution payments are to be paid to the clerk or "a court-authorized program run by the county attorney or the commonwealth's attorney of the county."
- Supervision fees, criminal garnishments, and other similar payments are to be made to the agency or organization or person rather than to the clerk, except for those payments owed to the Department of Corrections. For example, reimbursement of incarceration costs is paid to the jailer, while reimbursement for incarceration costs owed to the Department of Corrections is paid to the clerk.

KENTUCKY PRIVATE INVESTIGATORS LICENSING ACT

Senate Bill 139

This bill establishes extensive regulatory authority over private investigators, including some of the following provisions:

- A Board of Licensure for private investigators is created with membership to be appointed by the Governor. The Board consists of 7 members, with one Assistant Attorney General, a county sheriff, a municipal police officer, a citizen, and 3 private investigators.
- The Board is given regulatory authority, including the administration of a licensing examination.
- The board is given investigative and disciplinary authority over private investigators.
- A person must have a license to hold herself out to the public as a private investigator.
- "Private investigating" is defined, including "the business of obtaining or furnishing information with reference to crime or wrongs done or threatened against the United States or any state or territory of the United States…"
- To become licensed as a private investigator, among many qualifications, a person must be 21 years of age, be a citizen or resident alien, have a high school education or its equivalent, have been free for 10 years from a felony conviction, not have a misdemeanor involving moral turpitude or dishonesty within the previous 5 years, not have been dishonorably discharged, not have "chronically and habitually" used alcoholic beverages or drugs, and otherwise be of good moral character.
- This statute does not apply to employees of the Commonwealth of Kentucky or "any political subdivision thereof, performing his or her official duties with the course and scope of his or her employment." Nor does the statute apply to an attorney or an attorney's employee.

MISCELLANEOUS STATUTES

House Bill 52

This bill gives County Attorneys the authority to employ detectives similar to Commonwealth's Detectives.

House Bill 521

This bill, in addition to amending several statutes regulating public and private cemeteries, changes desecration of venerated objects from a Class D to a Class C felony. Violating graves is amended from a Class A misdemeanor to a Class D felony. There are also changes to the abuse of a corpse statute, including the following provisions:

- The definition of abuse of a corpse is expanded to include entering into a contract and accepting remuneration "for the preparation of a corpse for burial or the burial or cremation of a corpse and then deliberately fail[ing] to prepare, bury, or cremate that corpse in accordance with that contract."
- Abuse of a corpse is a Class D felony when the person entering into the contract fails to prepare, bury, or cremate a corpse after accepting money to do so.

House Bill 62

This bill creates a Class A misdemeanors for the "destruction, removal, sale, gift, loan, or significant alteration" of either a military heritage site or a military heritage object. A subsequent offense is a Class D felony. ■

Its name is Public Opinion. It is held in reverence. It settles everything. Some think it is the voice of God.

- Mark Twain

PUBLIC DEFENDER STATUTE REWRITTEN

House Bill 487, which passed during the 2002 General Assembly, has significantly changed KRS Chapter 31. This bill, sponsored by **Representative Kathy Stein** with **Representative Jeff Hoover** as the primary co-sponsor, and **Representative Jesse Crenshaw** joining as sponsor, was legislation supported strongly by the Department of Public Advocacy. It makes significant changes and improvements to the enabling statute of the Department of Public Advocacy. These changes will be described below.

KRS Chapter 31 is Reorganized

One of the primary changes to the new statute is that it has been substantially reorganized. Over time, KRS Chapter 31 became a statute that one had to read over and over in order to understand, with inconsistencies and redundancies abounding. House Bill 487 was an effort to reorganize in a simpler fashion to make it easier to read and implement. Redundancies and inconsistencies were eliminated.

KRS 31.010 remains the establishment section of the statute.

KRS 31.015 is the section pertaining to the Public Advocacy Commission.

KRS 31.030 describes the authority and duties of the Department.

KRS 31.035 describes the P& A Advisory Boards.

KRS 31.050-31.085 is the Governance Section.

KRS 31.100-31.120 is the section relating to eligibility and other definitions.

KRS 31.185 remains the section detailing the facilities, experts, transcripts, etc. to which public defenders are entitled in the representation of their clients.

KRS 31.211 &31.215 are statutes related to fees.

KRS 31.219 is the section detailing the duties of trial counsel related to perfecting appeals.

KRS 31.220 maintains the right of Kentucky public defenders to proceed on occasion into federal court.

KRS 31.235 describes the inherent responsibility of a court to appoint a public defender when the Department fails in its responsibility to provide a lawyer to a needy person.

KRS 31.241 maintains that other protections and sanctions remain.

Authority of the Department is Broadened

The duties of the Department remain substantially the same in KRS 31.030. However, the statute is clarified to state that not only does the Department have certain "duties" but also has "authority" to carry out those duties. Further, KRS 31.030 requires the Department not only to "conduct research into methods of improving the operation of the criminal justice system with regard to indigent defendants and other defendants in criminal actions," but also to develop and implement those methods of improvement.

Governance Remains the Same

The sections on the governance of the Department, particularly at the trial level, while reorganized, remains exactly the same as it was. Counties, urban county governments, charter counties, and consolidated local governments, all retain the right to select a plan for delivery services to indigents so long as those entities provide funding and support for their plan. The Public Advocate retains the right to approve, deny, or modify plans submitted. Plans must comply with DPA rules and regulations.

In addition, the previous statute requiring rather than allowing Jefferson County to establish and maintain an office of public advocacy is continued. Actually, this statute, rather than specifically naming Jefferson County, establishes 10 circuit judges as the size of a judicial circuit in which a county or other local entity must establish and maintain an office of public advocacy. Fayette County, with its 8 circuit judges, is approaching this cut-off as well.

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Rep. Jesse Crenshaw

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Two methods for delivering services at the trial level remain. A local government or the Department may establish an office of public advocacy. A local government or the Department may also contract with attorneys to deliver services. It should be noted at the present time that as of August 1, 2002, 112 counties would be covered by a full-time office, while only 8 counties will remain as contract counties. Each of the offices further contracts with private attorneys to provide conflict services.

Public Advocacy Commission Altered to Comply with *LRC v. Brown*

Significant changes have been made in the makeup of the Public Advocacy Commission. For years, the statute has been out of compliance with *LRC v. Brown*. Appointments by the Speaker of the House and the President Pro Tem of the Senate have been eliminated. In their place, one member of the Commission must be a "child advocate or a person with substantial experience in the representation of children," and be appointed by the Governor. A second member is to be the "executive director of the Criminal Justice Council of the Justice Cabinet." The statute also clarifies that current Commission members serve "until the expiration of" their current term.

Protection & Advocacy Language Modernized

Several new federal laws have passed pertaining to the Protection and Advocacy Division since Chapter 31 was amended. Those laws are now incorporated by reference into KRS 31.010, including Public Laws 99-319, 102-569, 103-218, 106-170, and 106-402. Further, to avoid becoming outdated in the future, the statute incorporates "any other federal enabling statute hereafter enacted that defines the eligible client base for protection and advocacy services."

DPA Allowed to Purchase Liability Insurance for Contract Attorneys

The Department has been allowed for many years to purchase liability insurance for full-time defenders. KRS 31.030(10) now authorizes the Department to purchase liability insurance for full-time and contract attorneys "to protect them from liability for malpractice arising in the course or scope of the contract."

Status Offenders Eligible for a Public Defender

Status offenders have long been represented by public defenders. The statutory authority for that, however, has been ambiguous. KRS 31.110(1) now clearly states that needy persons accused of having committed a status offense are eligible to be appointed a public defender.

MK v. Wallace Consent Decree is Codified

The Department has for several years represented children pursuant to a consent decree entitled *MK v. Wallace*, resolving issues between a group of children who filed suit against the Commonwealth. The Department has been designated both in the consent decree and later in the Commonwealth's budget as that entity to provide counsel to children in treatment facilities on issues of fact, duration, and conditions of confinement. KRS 31.110(1) now codifies that consent decree, stating that a needy person who has been "committed to the Department of Juvenile Justice or Cabinet for Families and Children for having committed a public or status offense as those are defined by KRS 630.020(2) or KRS 610.010(1)(a), (b), (c), or (d)" is entitled to be represented by a public defender. KRS 31.110(4) also states that a child irrespective of financial conditions and who is "in the custody of the Department of Juvenile Justice and is residing in a residential treatment center or detention center is entitled to be represented on a legal claim related to his or her confinement involving violations of federal or state statutory rights or constitutional rights."

Eligibility: Fine of $500 or More

Persons who are indigent and charged with an offense that is punishable by only a fine of $500 or more are no longer eligible to have a public defender appointed.

Eligibility Standard Altered

The biggest change made to the eligibility standard is the elimination in KRS 31.120(3) of the language that it "shall be prima facie evidence that a person is not indigent or needy within the meaning of this chapter…" if certain factors are present. The prima facie standard has been eliminated. Now the judge is simply called upon to consider several factors included in the appointment decision.

Several additional factors have been added to those to be considered by the court when deciding whether or not to appoint a public defender. Added are source of income, number of motor vehicles owned "and in working condition," the "poverty level income guidelines compiled and published by the United States Department of Labor," the complexity of the case, the amount a private attorney would charge for a similar case, the amount of time an attorney would reasonably spend on the case, and "any other circumstances presented to the court relevant to financial status."

Affidavit of Indigency Changed

The affidavit of indigency has been altered to include a variety of benefits that he/she may be receiving. It also explicitly informs the person that he understands that "he or she may be held responsible for the payment of part of the cost of legal representation."

Ex Parte Proceedings upon Request to Ask for Experts and Resources

KRS 31.185 is now the statute to look at when considering the question of what services a defender can utilize, including experts, and how to obtain those. KRS 31.200 has been eliminated and its provisions inserted into KRS 31.185.

One of the most significant changes in the entire bill is KRS

31.185(2), which reads that the "defending attorney may request to be heard ex parte and on the record with regard to using private facilities under subsection (1) of this section. If the defending attorney so requests, the court shall conduct the hearing ex parte and on the record." Defending attorneys now have a right to an ex parte hearing upon request.

Administrative Fee Abolished, Replaced by Court Costs

The administrative fee of KRS 31.051 has been abolished. The only fee specifically applied to public defender clients is the "recoupment fee" that has now been renamed "partial fee."

HB 452, the court cost bill, now provides that the Department will receive 3.5% of court costs, with a cap of $1.75 million. This replaced the administrative fee.

"Recoupment" Changes to "Partial Fee"

While the administrative fee has been abolished, "recoupment" has simply been renamed. Under KRS 31.211, the court at arraignment "shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs…This partial fee determination shall be made at each stage of the proceedings."

The failure to pay a partial fee becomes a civil judgment under KRS 31.211(2). Thus, no court should be ordering public defender clients to jail for failure to pay a partial fee.

Public defender clients who formerly paid the administrative fee of $52.50 may now be ordered to pay a partial fee of at least $50.

Where a governmental entity has chosen a plan approved by the Public Advocate, the partial fee is returned by the state to the local defender system. On the other hand, where the Public Advocate establishes the office, the money goes into the Department's special trust and agency account.

Clerks Have One Less Report to Make

The copy of the order or electronic report that clerks had to forward to DPA as to money collected pursuant to the schedule of payment pursuant to KRS 31.120(5) has been eliminated.

Effective Date

The effective date of HB 487 is July 15, 2002. ■

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REVENUE FOR DEPARTMENT CHANGES
Department Seeks to Complete Full-Time System with Raised Revenue

Significant changes have been made to the manner in which the Department of Public Advocacy meets its obligation to deliver services to indigents in Kentucky. Since the late 1970's, the Department received "recoupment" for money paid by indigents when they could afford some or not all of the cost of legal services. In the 1990's, two additional sources of revenue were added. First, the Department received 25% of the DUI fee. Second, the Department began to receive first $40 and then $50 in an administrative fee that was to have been imposed on all indigents appointed a public defender.

The General Assembly considers this revenue every two years when deciding upon the Department's budget for the biennium. In their budget bill, the General Assembly authorizes the Department to spend a particular sum of money that is expected to be taken in during the course of the biennium. If revenue exceeds the authorized amount, the Department can go back to an interim committee and seek to have the authorized amount raised to meet particular needs.

In Fiscal Year 2002, which ends June 30, 2002, the Department was authorized to spend $27,992,101 (after receiving a 3% budget reduction). This included $24,065,701 in General Fund dollars, $953,800 in federal dollars (mostly to fund P&A), and $2,972,600 from the 3 sources of revenue.

Revenue funds a number of vital programs in the Department, most of which are directly related to service delivery. $2,441,436 goes back to the Trial Division. In the remaining contract counties, by statute all recoupment must go back to fund the local program. In addition, $391,184 goes to the Elizabethtown Office, $100,000 goes to the Bell County Office, $575,000 goes to the Covington Office, $100,000 goes to the Henderson Office, and $80,000 goes to the Madisonville Office. $520,000 goes to the Post-Trial Division, including $200,000 to fund staff in the Appeals Branch and $200,000 to fund staff in the Capital Post-Conviction Branch.

Revenue has Stabilized at $3 Million

Revenue from the three sources has stabilized at approximately $3 million each year. In FY00, $3,066,573 was collected. $873,526 came from the administrative fee. $1,193,044 was collected from the DUI fee. Finally, $1,000,001 was paid in recoupment, much of which went back to the local contract public defender systems.

In Fiscal Year 01, $3,043,866 was recovered from the three revenue sources. $841,698 came from the administrative fee. $1,295,949 came from the DUI fee. Recoupment dropped to $906,237.

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Finally, during the first 7 months of Fiscal Year 02, $1,789,526 has been recovered, including $497,719 from the administrative fee, $775,853 from the DUI fee, and $515,953 from recoupment.

Revenue has remained at a relatively stable rate as of the 2002 General Assembly. However, several actions by the 2002 General Assembly altered the picture significantly.

House Bill 452 Eliminated the Administrative Fee

First, the General Assembly passed House Bill 452, which eliminated the administrative fee of KRS 31.051. The administrative fee never reached its potential as originally envisioned in 1994. A $50 fee for 100,000 cases per year should have resulted in significant revenue for the Department, perhaps as high as $3-4 million. However, the administrative fee never reached even $1 million per year. House Bill 452 recognized that the administrative fee, as with many other add-on fees, needed to be abolished.

House Bill 452 Included the Department in Court Costs

House Bill 452 replaced many add-on fees, including the public advocacy fee, and substituted in its place a share of court costs. In criminal cases after August 1, 2002, a $100 court cost will be imposed in all criminal cases. The Department of Public Advocacy will receive 3.5% of the court cost. The Department's share of the court cost fund will be capped at $1.75 million. We will have to wait until later in the fall to see whether the revenue will reach the capped amount. We are hopeful.

Partial Fee Continues in HB 487

The Recoupment Fee, like the DUI fee, will continue to be an important revenue source for the Department. The Recoupment Fee has been renamed "Partial Fee" in KRS 31.211. Courts will determine "whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings."

KRS 31.211(3) states that "all moneys received by the public advocate from indigent defendants …shall be credited to the public advocate fund of the county" where the county has chosen a plan. In KRS 31.211(4) it states that if there is no county plan, (*i.e.* a state full-time office), the money collected "shall be credited to the Department of Public Advocacy special trust and agency account to be used to support the state public advocacy system."

This Partial Fee continues to be a viable and important part of the Department's revenue.

Completing Full-Time System is within Reach

As of August 2002, 112 counties will be covered by a full-time office, including 109 state-run offices, and 3 offices established under a county plan. 8 counties remain part-time contract counties. It has been the goal of the Department of Public Advocacy to complete the full-time system in all 120 counties by July 2003.

The budget for the biennium has not been completed by the time of this writing. However, if the budget that is passed resembles the Governor's budget, or the budgets passed by the two chambers more than once during the regular and special sessions, there will be 2 additional full-time offices in Boone County and Cynthiana by July 2003. Those 2 offices will cover 5 additional counties.

Only 3 counties, Barren, Metcalfe, and Campbell Counties will remain. A Glasgow Office covering Barren, Metcalfe, and Monroe Counties is on the drawing board. In addition, Campbell County is going to be covered by the Covington Office. These three counties can be covered by an additional $400,000. It is the Department's hope that this can be accomplished by July 2003.

How is that possible, given the difficult budgetary times we are in? After all, the Department's budget was cut 3% in FY02, and the biennial budget now being discussed includes 26 unfunded positions.

House Bill 452 capped the Department's share of court costs at $1.75. That is above the usual $850,000 the Department receives from the administrative fee. We will be able to see whether the cap is reached later in FY03. If the cap it reached, it is hoped that the three additional counties can be covered by a full-time office beginning July 2003.

Partial Fee should include previous administrative fee

There remains one other significant possibility to raise sufficient money in the next biennium to complete the full-time system, fund the 26 unfunded positions presently in the Department's budget, and lower the caseloads in our high caseload offices.

The Department believes that much of the $50.00 paid in administrative fees during the past 8 years can be imposed legitimately as a partial fee. If the Department can receive ½ of the administrative fee in the form of partial fees, this would go a long way toward solving this most recent budget crisis for the Department.

I invite defenders and judges to explore whether replacing the old administrative fee with a small partial fee of $50.00 is viable within the new Chapter 31. I also welcome any comments or questions on this proposal. ■

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Indigents Do Not Pay Costs of Discovery

RENDERED: December 15, 2000 2:00 p.m.
NOT TO BE PUBLISHED

Discretionary Review Denied December 12, 2001

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS
NO.1998-CA-002500-MR

DEPARTMENT OF PUBLIC ADVOCACY, COMMONWEALTH OF KENTUCKY, and FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION N0. 98-CR-00379

DOUGLAS M. STEPHENS, JUDGE, KENTON CIRCUIT COURT, SECOND DIVISION, and KENTON COUNTY COMMONWEALTH'S ATTORNEY'S OFFICE — APPELLEES

NO. 1998-CA-002501-MR

DEPARTMENT OF PUBLIC ADVOCACY, COMMONWEALTH OF KENTUCKY, and FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION N0. 98-CR-00324

PATRICIA M. SUMME, CHIEF JUDGE, KENTON CIRCUIT COURT, FOURTH DIVISION, and KENTON COUNTY COMMONWEALTH'S ATTORNEY'S OFFICE — APPELLEES

NO. 1998-CA-002502-MR

DEPARTMENT OF PUBLIC ADVOCACY, COMMONWEALTH OF KENTUCKY, and FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE

PATRICIA M. SUMME, CHIEF JUDGE, KENTON CIRCUIT COURT, FOURTH DIVISION, and KENTON COUNTY COMMONWEALTH'S ATTORNEY'S OFFICE — APPELLEES

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N0. 1998-CA-002788-MR

DEPARTMENT OF PUBLIC ADVOCACY, COMMONWEALTH OF KENTUCKY, and FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00371

PATRICIA M. SUMME, CHIEF JUDGE, KENTON CIRCUIT COURT, FOURTH DIVISION, and KENTON COUNTY COMMONWEALTH'S ATTORNEY'S OFFICE — APPELLEES

OPINION
REVERSING AND VACATING

BEFORE: HUDDLESTON, McANULTY AND MILLER, JUDGES.

McANULTY, JUDGE: The consolidated actions in this appeal arose when the Kenton County Commonwealth's Attorney sought payment from the KRS 31.185 special account for the costs incurred by his office for copying discovery materials provided to indigent defendants who were represented by the Kenton County Public Defender Office. The circuit courts granted the motions for reimbursement. We reverse.

In the first of these cases, the Commonwealth's Attorney filed a motion in the circuit court for an order requiring the Kenton County Public Defender system to pay for copies received from the Commonwealth's Attorney's Office for discovery under the rules of procedure for the fiscal year 1997-1998, in the total amount of $779.40. On September 1, 1998, Chief Judge Patricia Summe entered an order, styled "IN RE: Copies Provided by Kenton County Commonwealth's Attorneys Office to the Kenton County Public Defender's Office," that ordered the Kenton County Public Defender to pay the Commonwealth's Attorney's Office $779.40 for the "reasonable and necessary" cost of copying discovery for 1997-1998. Judge Summe further adjudged that the amount was to be paid by the Finance and Administration Cabinet from the special account provided in KRS 31.185 and KRS 31.200.

Thereafter, in three criminal cases involving indigent defendants, Kenton County circuit courts ordered payment from the special account for copying costs for discovery in each case, in amounts ranging from $10.00 to $40.00. The Finance and Administration Cabinet and the Department of Public Advocacy (hereinafter appellants) appealed the reimbursement orders, which were consolidated in the present appeal. We find that review of appellants' arguments is proper since, although they were not raised below, appellants were not parties to the underlying criminal cases and had no opportunity to raise the objections below. RCr 9.22.

Having reviewed the issues herein and the applicable law, we conclude that the statutes cited by the circuit court do not constitute authority for the reimbursement orders. KRS 31.185 and KRS 31.200 control when the special account funds are to be paid. As will be shown, neither statute applies in this set of circumstances. We do not find, therefore, that the General Assembly intended these costs to be paid from the special account.

Appellants argued first that the special account cannot be charged for copying expenses because indigent defendants are exempted from such costs by KRS 31.110(1). That statute provides that a needy person who has been detained or charged is entitled to attorney representation. Further, it provides: "The courts in which the defendant is tried shall waive all costs." Appellants argue that because this provision does not specifically say "**court** costs," the legislature must have intended it to be more expansive and comprehensive than a waiver of court costs. They would have us apply it to waive the copying costs ordered by the circuit court

We disagree with this interpretation for two reasons. First, we note that KRS 31.110 0) clearly states that the court shall **waive** costs. This must mean court costs, since the use of the word waive implies that the court shall relinquish its costs as opposed to costs or expenses owed to others (such as a witness fee or cost of a transcript). We believe, therefore, that provision excludes fees that constitute court costs incident to litigation, or fees to officers for services. *Cf. Stafford v.Bailey*, 282 Ky. 525, 138 S.W.2d 998 (1940). Secondly, an expansive definition which discharges all costs incurred in representing indigent defendants would render the other statutes in Chapter 31 pertaining to expenses for representation of indigents - KRS 31.185 and KRS 31.100 - meaningless. "KRS 31.100, et seq., is a unified enactment[.]" *Morton v. Commonwealth*, Ky., 817 S.W.2d 218, 220 (1991). Each section of a legislative act should be read in light of the act as a whole, with a view to making it harmonize, if possible, with the entire act and with each section and provision thereof. *Kentucky Tax Commonwealth v. Sandman*, 300 Ky. 423, 189 S.W.2d 407 (1945). In order for the whole act to have meaning, "costs" cannot mean all costs and expenses. For these reasons, we reject appellants' expansive interpretation of KRS 31.110(1), and hold that it does not govern the issue in the case at bar.

Turning our attention to the two statutes relied upon by the circuit court, KRS 31.185(1) states:

> Any defending attorney operating under the provisions of this chapter [Department of Public Advocacy] is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

Section (3) of KRS 31.185 dictates that all court orders entered pursuant to the above provision be paid by the Finance and Administration cabinet from the special account; section (2) establishes the funding for the special account. As appellants interpret this statute, it was error for the trial court not to find that the public defenders were entitled to use state facilities rather than be charged for copies. The Commonwealth counters that this statute has no application because evaluation of evidence does not encompass the mere copying of discovery compliance materials. We agree with the Commonwealth.

The Commonwealth correctly asserts that KRS 31.185 was designed to ensure that indigent criminal defendants have access to expert assistance for the evaluation of evidence. In cases applying KRS 31.185, it has been used to allow defendants **either** to use state facilities and personnel for expert assistance, or to pay for a private facility or private expert. *See Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995)(mental health expert witness); *McCracken County Fiscal Court v. Graves*, Ky., 885 S.W.2d 307 (1994)(investigative costs, psychological examination fees, expert psychological witness); *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987)(crime scene or ballistics expert); *Todd v. Commonwealth*, Ky., 716 S.W.2d 242 (1986)(mental evaluation); *Perry County Fiscal Court v. Commonwealth*, Ky., 674 S.W.2d 954 (1984)(psychologist and ballistics expert). We conclude that a prosecutor's staff and office equipment are not the sort of "state facility for the evaluation of evidence" that the statute was designed to provide to criminal defendants. Indeed, furnishing copies of discovery documents does not constitute evaluation of evidence. Thus, we hold KRS 31.185. has no application to this question.

The Commonwealth asserts that, the costs are payable pursuant to KRS 31.200. That statute states, in pertinent part:

> (1) Subject to KRS 31.190, **any direct expense**, including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript **that is necessarily incurred in representing a needy person under this chapter**, is a charge against the county on behalf of which the service is performed; provided, however, that such a charge shall not exceed the established rate charged by the Commonwealth and its agencies.
>
> (2) Any direct expense including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript shall be paid from the special account established in KRS.31.185(2) and in accordance with the procedures provided in KRS 31.185(3). (Emphasis supplied.)

We believe that this statute does not provide authorization for the copying costs either. It concerns payment only for a necessary "direct expense" of representation of an indigent defendant by a public advocate. The expense incurred by the Commonwealth in making copies to provide discovery is a direct expense of the Commonwealth. Thus, KRS 31.200 does not address the situation in these cases. We conclude that the Commonwealth has failed to show a means for charging the copying expense against the special account within the statutes which govern it.

Furthermore, we agree that the criminal discovery rules provide no support for the Commonwealth's Attorney's motion for payment. RCr 7.24 requires the Commonwealth "to permit the defendant to inspect and copy or photograph" discovery materials, "or copies thereof." RCr 7.26 requires the Commonwealth to produce witness statements and make them "available for examination and use by the defendant." The Commonwealth argues that neither rule *requires* it to do photocopying. This is true. The rules say that the defendant may inspect and copy the actual items in the possession of the Commonwealth, and thus mean that a defendant may take possession of them. However, they also allow the Commonwealth to provide copies of the items in lieu of having the defense take them to inspect, copy and/or photograph. As a result, the Kenton County Commonwealth's Attorney's Office could provide the originals to the defendants, or prepare copies so as to ensure that the evidence remains in its custody and control. The Commonwealth's Attorney elected to prepare and provide the defense with copies rather than furnish the evidence to the defendants. Nothing in the criminal rules places the expense of this decision by the Commonwealth's Attorney on the defense. Office expenses of Commonwealth's Attorney's offices in the performance of their duties are to be paid by the Commonwealth. KRS 15.750.

For the foregoing reasons, we reverse and vacate the orders in these consolidated cases which ordered payment of the expense of photocopying discovery from the special account of KRS 31.1$5.

ALL CONCUR. ■

Kentucky's Violent Offender Statute: Potential Challenges Under *Apprendi v. New Jersey*

KRS 439.3401 categorizes certain penal code offenses as "violent offenses" and then imposes additional punishments for those offenses, over and above the normal penalties prescribed by the statutes defining those crimes. These additional punishments include delayed parole eligibility and significant limitations on earning and benefiting from "institutional good time."

Prior to the enactments of the 2002 General Assembly, a "violent offender" was a person convicted of "a capital offense, a Class A felony, or a Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim."

During the most recent meeting of the legislature, however, lawmakers expanded the list of "violent offenses" and this statutory amendment carries the potential for ever more cases to arise in which defense counsel will be called upon to challenge a client's "violent offender" designation, using the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Kentucky's Statutory Scheme for Violent Offenders

Parole Eligibility. Regular parole eligibility for a non-violent offense is 20% of the total sentence. KRS 439.340. Under that statute, 20% of an inmate's sentence much be served before the inmate can be considered for release on parole. But, under KRS 439.3401, parole eligibility for a **violent** offense committed between July 15, 1986, and July 15, 1998, is increased to 50%, and eligibility for a violent offense committed after July 15, 1998, is delayed until 85% of the sentence has been served. A violent offender, who is sentenced to a term of years, may actually end up with a greater parole eligibility than someone sentenced to life imprisonment.

Credits Against Sentence. In addition to delayed parole consideration, violent offender inmates are prohibited from earning "good time" in prison. Under KRS 197.045, Kentucky inmates may receive credits against their sentences, based upon good conduct, educational accomplishment, and/or meritorious service. The good conduct credit, (known as "good time"), is a very significant benefit, because it reduces an inmate's sentence by up to 10 days for each month the inmate serves. However, an inmate who is a "violent offender" under KRS 439.3401 is prohibited from earning this good time credit. Moreover, although a violent offender may still earn the educational credit and the meritorious service credit, those credits may not reduce the offender's serve-out time to less than 85% of the sentence originally imposed. This limitation on the benefits of "educational good time" and "meritorious good time" are not imposed on non-violent offenders.

Experienced criminal defense practitioners know very well the impact of this onerous statute on their clients. Most of us have known defendants whose decisions on whether to accept otherwise reasonable plea offers centered almost exclusively on the defendants' overarching interest in avoiding the "violent offense" designation, which they quite reasonably view as the kiss of death.

Apprendi v. New Jersey

In *Apprendi*, the defendant received an enhanced sentence on the basis of factual findings made by the trial court, (rather than by a jury), and the court's findings were made upon a preponderance of the evidence, (rather than beyond a reasonable doubt). The sentencing judge found, by a preponderance of the evidence, that one of the defendant's weapons offenses was committed with a motive to intimidate a victim because of racial bias. Under New Jersey's hate crimes statute, the range of penalties for the weapons offense **doubled**, based upon that judge's finding.

But, the United States Supreme Court held in *Apprendi* as follows:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . (I)t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (Citations omitted.) *Apprendi*, *supra*, at 120 S.Ct. 2362-63.

In addition to mandating a jury finding beyond a reasonable doubt, the *Apprendi* court also quoted a "succinct rule" which had previously been found in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 331 (1991): "**(T)he indictment** must contain an allegation of every fact which is legally essential to the punishment to be inflicted," (emphasis added).

So, before any particular punishment may be imposed, the factual basis for that punishment must be (a) alleged in the indictment and (b) proven beyond a reasonable doubt, (c) to a jury. (For a fuller discussion of the *Apprendi* and *Jones* decisions, see "Flood Warning!!: Will Kentucky Get Hit By the *Apprendi* "Watershed"?!," *The Advocate*, Vol. 23, No. 3, May 2001.)

The Kentucky Supreme Court has also recognized that facts which increase the defendant's penalty range must be charged in the indictment. For example, in the appendix of official forms following the Kentucky Rules of Criminal Procedure, a death penalty murder indictment reads differently from a non-death penalty murder indictment; in order for the prosecution to seek a death sentence, the grand jury must have charged both the facts constituting murder and the facts constituting at least one of the statutory aggravating circumstances listed in KRS 532.025. *See* Official Form 15. Similarly, the form for indicting a defendant as a persistent felony offender under KRS 532.080 includes not only the facts constituting the current offense, but also includes allegations as to the existence of the prior felonies which are necessary before enhanced penalties can be imposed. *Id*.

In Kentucky, a sentence which carries a delayed parole eligibility is a higher sentence than the same sentence carrying normal parole eligibility. This can be seen from, for example, the fact that, under KRS 532.030, a sentence of life without the benefit of parole until after 25 years is a higher sentence than a life sentence with just the normal parole eligibility. And, in accordance with *Apprendi*, the penalties of life without parole and life without parole until after 25 years are required by statute to be based upon an additional **jury** finding of an aggravating circumstance, **beyond a reasonable doubt**. KRS 532.025.

If a sentence with postponement of parole eligibility is a harsher sentence than a sentence without any such postponement, then *Apprendi* would seem to require a grand jury indictment and a petit jury finding beyond a reasonable doubt as to any facts on which the delayed parole eligibility is based. That puts the violent offender situation, with its delayed parole eligibility, squarely within the ambit of *Apprendi*.

The prohibition against a violent offender earning good time, and reducing the benefits to a violent offender of educational and meritorious service credits, also implicate *Apprendi*. When the Department of Corrections first receives an inmate with a new sentence, that inmate's records are set up to reflect **all** the potential good time he or she could earn while in custody. In other words, from the moment of first arrival at prison, the inmate's serve-out date is calculated by giving the inmate credit, in advance, for the statutory maximum good time. So, for example, a run-of-the-mill inmate sentenced in 2002 to 10 years on a non-violent offense will not have a serve-out date in 2012. Rather, the inmate will be credited immediately with good time of ten days per month of his sentence, and the inmate's resident record card will show a serve-out date in 2009 or 2010.

But, if the inmate has been designated a "violent offender" under KRS 439.3401, then he cannot earn that good time. In the example above about a 10-year sentence, the violent offender's serve-out date will be recorded as 2012, instead of 2009 or 2010. A "violent offense" serve-out, delayed by 2 1/2 years, should be deemed a longer sentence than a non-violent offense which is not similarly delayed. Therefore, the prohibition against good time for a violent offender is also a reason why, under *Apprendi*, facts which give rise to the "violent offender" designation should be charged in the indictment and presented to a jury for decision at the standard of beyond a reasonable doubt.

Apprendi Issues in Violent Offender Cases

Even under the statute as it existed before the 2002 amendment, there were potential *Apprendi* problems lurking in the violent offender context. For example, a court might try to sentence a Class B first-degree burglary defendant as a violent offender, if the defendant had been found guilty under KRS 511.020(6)(b), which requires a finding that a victim was injured. But, the violent offender statute requires there to have been "**serious** physical injury," while a first-degree burglary conviction entails a finding of only "physical injury." In other words, even before the new amendments to the violent offender statute, defense counsel had to be on the lookout for a court trying to make its own finding of "seriousness," in the absence of any jury finding on that element beyond a reasonable doubt.

Now, however, the legislature has expanded the definition of "violent offender." The definition now reads as follows, (with the new portion highlighted):

> . . . "(V)iolent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim, ***burglary in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040, or robbery in the first degree***.

In short, the legislature has now included first-degree robbery and some additional first-degree burglaries on the list of violent offenses. It appears that the first-degree burglaries, which are newly classified as "violent," are those that are accompanied by a completed or attempted

- felony sex offense
- first-degree assault
- second-degree assault
- assault of a family member
- first-degree wanton endangerment, or
- kidnapping.

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Under the principles of *Apprendi*, no first-degree burglary defendant should be given violent offender status under these new provisions unless (a) the defendant was charged in the indictment with the facts necessary to constitute one of those listed enhancement offenses and (b) all of the elements of at least one of the enhancement offenses are found by a jury, beyond a reasonable doubt.

It is fairly predictable, though, that some court will try to impose violent offender status on a first-degree burglary defendant who has not been convicted of, or even charged with, one of those additional, sentence-enhancing offenses. This type of error will be especially likely in situations where the enhancement fact is an **attempted** offense, because attempts are much less likely to have been charged in the indictment.

Particularly dangerous will be the family member assault scenario, in which a defendant can receive felony violent offender status, and all the attendant enhanced penalties, for behavior which really constitutes only a Class B misdemeanor, (*i.e.*, attempted fourth-degree assault). The family member assault statute is KRS 508.032. Under that statute, certain subsequent offense fourth-degree assaults against a family member or member of an unmarried couple can morph from normal, Class A misdemeanor assaults into Class D felony assaults. That means, of course, 1-5 years in prison instead of 90 days to 12 months in the county jail. "Violent offender" status under the amended KRS 439.3401 would then add on the penalties of delayed parole eligibility and limits on institutional credits against sentence, ("good time"), if the assault was accompanied by a first-degree burglary. In order to comply with the mandate of *Apprendi*, a defendant may be labeled a "violent offender" for a first-degree burglary, accompanied by a completed or attempted family member assault, only if all of the following facts are charged in the indictment and proven to a jury, beyond a reasonable doubt:

1. all elements of the newly-committed first-degree burglary,
2. all elements of the newly-committed family member assault or attempted family member assault,
3. each of the prior fourth-degree assault convictions, and
4. the fact that each of the prior convictions involved a victim who fit the KRS 403.720 definition of "family member" or "member of an unmarried couple," (which fact might not be shown on the face of the documents used by the prosecution to prove that the prior assault convictions did occur).

Much of the same analysis will have to be done in cases where the first-degree burglary is accompanied by a felony sex offense, which happens to be a felony only because KRS 510.015 elevates certain subsequent misdemeanors to felony status.

So, once again, the Kentucky General Assembly has managed to make a confusing penal code ever more confusing. This puts the burden on defense counsel to monitor meticulously the many layers of punishment that prosecutors and judges will try to heap upon hapless defendants. But, if trial lawyers do their jobs, then our appellate lawyers will be grinning from ear to ear, because the potential for reversible error is written all over this new statutory change.■

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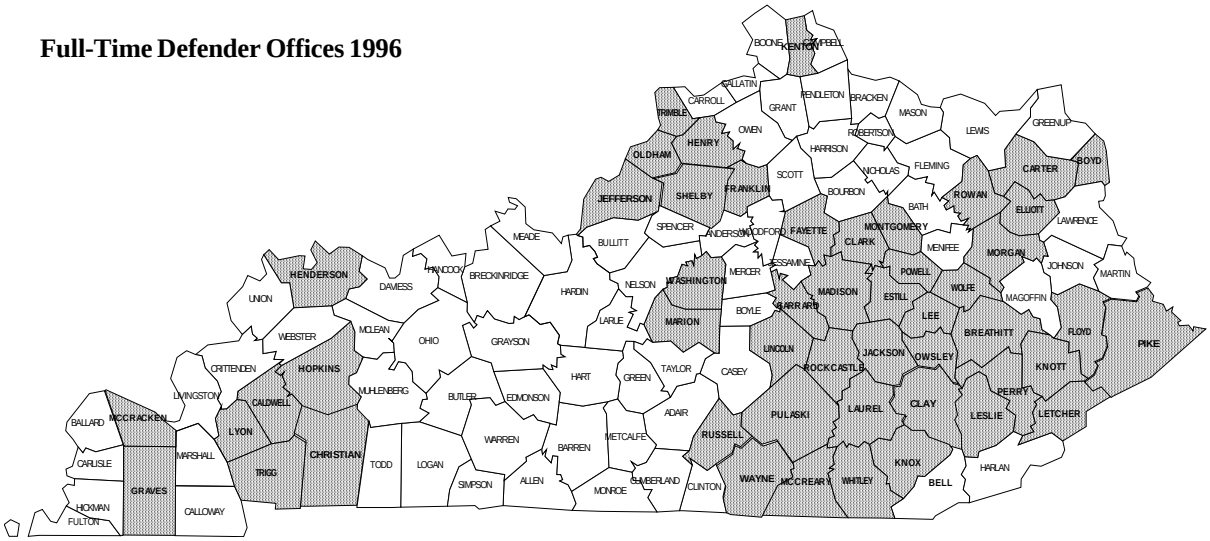

KENTUCKY CASELAW REVIEW

Euva Hess

Combs v. Commonwealth,
Ky., —— S.W.3d —— (5/16/2002)
(Reversing and Remanding)

Defense Counsel can call a witness that will take the Fifth on certain questions, so long as those questions are not material to the witness's testimony. The Kentucky Supreme Court found that the trial court erred by excluding the testimony of a defense alibi witness that intended to take the Fifth on certain questions. The Commonwealth charged Combs with two counts of trafficking in a controlled substance. In her defense, Combs argued she was not the purveyor because she was not at home at the time of the alleged sales. During the first sale, Kmart loss prevention officers had detained her for shoplifting. During the second sale, she was at her hairdresser's.

During trial, Combs wanted to introduce the testimony of Tracy Williams, her cohort in shoplifting. As Williams shoplifting charges had not been disposed, Williams intended to take the Fifth on questions pertaining to her role in the crime. The trial court and Court of Appeals previously held, as a blanket rule, that witnesses could not selectively invoke the Fifth Amendment during cross examination. The Supreme Court disagreed.

A witness may invoke the privilege on cross so long as the invocation does not frustrate cross examination on issues material to the witness's testimony. In this case, Williams would have testified that she was with Combs and they were detained for shoplifting. The Supreme Court held that the "particular details upon which Williams intend to invoke her privilege – i.e. Whether she and Appellant had shoplifted or attempted to shoplift merchandise at K-mart that afternoon-were neither necessary to a probing cross-examination nor particularly probative as to Williams's truthfulness." Moreover, the Court noted that the Commonwealth could test Williams's veracity by asking about other details of the K-mart trip.

Justice Wintersheimer dissented adopting the blanket rule that witnesses may not selectively invoke their Fifth Amendment privilege.

Lynch v. Commonwealth,
Ky., — S.W.3d — (5/16/02)
(Affirming)

Under KRE 504 (c) (2) (C), Crimes committed against members of the household abrogates the marital privilege. The Court defined "members of the household" to include anyone residing with the defendant, including roommates. Lynch appealed his life sentence stemming from murder and tampering with physical evidence convictions. The case involved a love triangle between the victim, Lynch, and Lynch's ex wife. At the time of the victim's death, Lynch's ex-wife did not live in the home. However, the victim and Lynch were roommates. The alleged affair had occurred some time in the past and the victim had a new girlfriend.

On appeal, Lynch argued that the trial court erred when it admitted the testimony of Lynch's ex-wife. She testified that Lynch admitted the killing to her. Lynch argued that the marital privilege protected the communication.

The trial court held that the testimony was admissible under KRE 504 (c) (2)(C). Under this exception, the marital privilege does not apply in "any proceeding in which one spouse is charged with wrongful conduct against 'an individual residing in the household of either.'" The Supreme Court held that the trial court, using a preponderance of the evidence standard, did not err in its decision that the victim resided in the household of the defendant. Thus, Lynch's ex-wife's testimony was admissible.

The length of time the jury spent deliberating the verdict does not lend to the conclusion the jurors had previously discussed the case and has no bearing on the validity of the conviction. The Supreme Court also held that the trial court did not err by failing to grant a mistrial when the jury returned with a guilt verdict after 29 minutes and a sentence in 18 minutes. Lynch alleged the jury must have discussed the case prior to retiring for deliberations. The Court reiterated that the law "does not prescribe the length of time a jury shall spend in deliberation." *See also Smith v. Commonwealth*, Ky., 375 S.W.2d 242 (1964) (Jury returned guilty verdict for murder after 34 minutes) and *De Berry v. Commonwealth*, Ky., 289 S.W.2d 495 (1953), cert. denied, 352 U.S. 881, 77 S.Ct. 105, 1 L.Ed.2d 81 (1956) (Jury was out only 20 minutes before murder conviction). As such, no error occurred.

Justice Keller concurred in part and dissented in part joined by Justice Stumbo. Keller would affirm the tampering with physical evidence conviction but opined the Court misconstrued 504. According to Keller, the phrase "in the household" refers to family units not dwellings. Thus, the victim who resides in the household must be something more than just a roommate.

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Commonwealth v. Philpott,
Ky., — S.W.3d — (5/16/02)
(Certification of the Law)

The circuit court can no longer advise the jury of penalties in conjunction with misdemeanor offense instructions. A trial in circuit court that results in a conviction must have a penalty phase. The Court held that when misdemeanor instructions are given by the court in the guilt phase, whether as a result of the indictment or as lesser included offenses, the court IS NOT to instruct the jury on the misdemeanor penalties. Rather, the jury is simply to determine guilt.

If the jury convicts only on the misdemeanors, no new evidence is taken. However, the court is to instruct the jury on penalty and give both sides the opportunity to argue the appropriate penalty to the jury.

If the jury convicts on a misdemeanor and a felony or combinations of both, a trifurcated proceeding follows. The court is to instruct on the penalties for the misdemeanors. Counsels shall argue the penalties. The jury shall deliberate and return a verdict. THEN, the court shall hold the truth in sentencing (and presumably PFO hearing if applicable) allowing evidence of prior convictions. The court should then instruct on felony penalties and permit argument. The jury shall then retire and deliberate.

Concurring opinion by Keller. Keller favors truth-in-sentencing, hence he favors the taking of new evidence, prior to jury's deliberation on the misdemeanor sentence.

Commonwealth v. Suttles,
Ky., —— S.W.3d — (4/25/02)
(Reversing the Court of Appeals)

The Kentucky Supreme Court found sufficient evidence to convict Suttles of complicity to assault. The Kentucky Supreme Court reversed the Court of Appeals's opinion that the Commonwealth presented insufficient evidence that Suttles acted in complicity to assault the victim. The Supreme Court found sufficient evidence based on the testimony.

In the early morning hours of June 28, 1998, Suttles, along with his brother and two friends, Rahm and Charles, walked to a local grocery. As they walked, a pickup truck occupied by the victim and his brother approached them. According to the victim, he yelled at the four individuals to get out of the road and continued on his route. Rahm, on the other hand, testified that he and his companions walked in the road because there were no sidewalks; that the pickup truck swerved at them and that someone in the vehicle yelled something he thought was expletives. The truck drove on and Rahm ran after it with Suttles following closely behind and the remaining two following. The chase covered approximately three city blocks. Eventually, the vehicle stopped in front of the home of the victim's mother to drop off the brother. When the four individuals caught up to the truck a verbal altercation ensued. The victim's brother went inside to call the police after Suttles allegedly threatened the victim with a knife. At some point shortly thereafter, Charles, who had picked up a piece of rock or concrete during the chase, struck the victim in the head. Suttles, Rahm and Charles were charged with first-degree assault.

At trial, the victim and his brother stated that during the argument, Suttles had threatened to cut him (the victim) with a knife. The victim's brother specifically recalled seeing a knife in Suttles' hand. Suttles denied making any threats or cutting anyone with the knife. Suttles and his companions fled the scene and were later arrested at Rahm's residence where a knife was discovered in Suttles' pocket. Subsequent laboratory tests on the knife taken from Suttles were negative for blood or hair evidence. Suttles' brother and Rahm testified that Suttles had neither threatened nor attacked the victim.

Since there was testimony that Suttles and his friends chased the truck three blocks. And, Suttles was within two feet of the victim during the confrontation. And, the victim and Suttles argued. And, during the argument, Suttles threatened the victim with a knife. And, a witness remembered seeing the knife in Suttles hand. And after his companion hit the victim in the head with a piece of concrete, Suttles fled the scene. And, when he was arrested a knife was found in his pocket. The Supreme Court found sufficient evidence for the case to go to the jury. *Commonwealth v. Benham*, Ky., 816 S.W.2d 186 (1991) and *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1983). Moreover, the Supreme Court reiterated that the testimony of a single witness is sufficient for conviction despite testimony to the contrary. *Murphy v. Sowders*, 801 F.2d 205 (6th Cir. 1986). Finally, the Court reiterated intent could be inferred from the circumstances. *See Mills v.. Commonwealth*, Ky., 996 S.W.2d 473 (1999); *Talbot v. Commonwealth*, Ky., 968 S.W.2d 76 (1998); *Dishman v. Commonwealth*, Ky., 906 S.W.2d 335 (1995); *Stevens v. Commonwealth*, Ky., 462 S.W.2d 182 (1970).

Justice Johnstone filed a dissent joined by Justice Stumbo. Johnstone found the evidence insufficient. He argued Suttles was charged with complicity to the act under 502.020 (1) therefore, Suttles must have intended his friend hit the victim in the head with the concrete slab. Johnstone found no evidence of this intent, only evidence that Suttles was present when the argument and assault occurred.

Jordan v. Commonwealth,
Ky., — S.W.3d. — (4/25/02)
(Reversing and Remanding)

A social worker's report which states that the allegations were "substantiated" is nothing more than improper opinion testimony. The Kentucky Supreme Court reversed because the trial court allowed the Commonwealth to introduce

the contents of a DSS 150 on rebuttal. The DSS 150 is the report compiled by social workers at the conclusion of an investigation. During this case, witnesses testified that the victim made false allegations of sexual abuse against Jordan's father. The Commonwealth sought to bolster the victim's testimony with this form. The DSS 150 prepared in that investigation stated that the allegations were "substantiated." The Kentucky Supreme Court held "a social worker's 'professional determination' that an allegation of abuse is 'substantiated' is nothing more than improper opinion testimony." *See Prater v. Cabinet for Human Resources*, Ky., 954 S.W.2d 954 (1997).

Additionally, the Supreme Court noted that if report were admitted for a proper purpose, proffering party must comply with KRE 803(6) (regularly conducted activity) not 803(8) (public record). Finally, the Supreme Court held that the trial court did not err by overruling the motions for directed verdict, despite the fact the testimony at trial was "a swearing contest."

Bailey v. Commonwealth, & Wright v. Commonwealth,
Ky., 70 S.W.3d 414 (2002)
(Reversing)

The trial court does not have discretion under KRS 532.070 to sentence a defendant who plead guilty to county jail. The statute requires a sentence recommendation by the jury. The Appellants entered guilty pleas to DUI charges. The Commonwealth recommended a total of one year in prison on the charges. The judge pursuant to KRS 532.070 (2) sentenced the Appellants to 12 months in county jail instead. For class D felonies, 532.070 (2) permits a trial judge to sentence a defendant to a term of one year or less in county jail if he/she opines that a prison sentence is unduly harsh. However, the statute requires the sentence be fixed by a jury. Thus, the trial court may not exercise this discretion when a client enters a guilty plea. To the extent *Commonwealth v. Doughty*, Ky. App., 869 S.W.2d 53 (1994), held otherwise, the Supreme Court overruled that decision.

Commonwealth v. Bailey,
71 S.W.3d 73 (2002)
(Reversing and Remanding)

The Commonwealth is not limited to an appeal for certification of the law when the trial court grants a defendant's Motion for New Trial.

The Supreme Court held that the Commonwealth is not limited to seeking a certification of the law when the trial court grants the defendant's motion for a new trial. The Commonwealth may take an appeal and ask the appellate court to reinstate the jury's verdict. The Court distinguished a motion for a new trial from a jnov stating "a motion for a new trial is generally directed towards alleged errors committed during the course of the trial, while a motion for jnov is directed towards the sufficiency of the evidence." The Court stated 22A.020(4)(a)&(b) permitted the Commonwealth to appeal the trial court's order without regard to its finality. The Court overruled *Commonwealth v. Litteral*, Ky., 677 S.W.2d 881, 885 (1984) to the extent it limited the Commonwealth's appeals from new trial orders to a certification of the law. The standard of review of the new trial order is abuse of discretion. Moreover the court held that an appeal from a new trial order stayed the proceedings in the trial court.

Justice Stumbo dissented.

Commonwealth v. Morriss,
70 S.W.3d 519 (2002)
(Reversing the Court of Appeals)

Although KRS 189A.105(2)(b) permits the trial court to enter a search warrant for blood and urine of the defendant in certain circumstances, the defendant must actually be charged with an offense to fall within the statute. While KRS 189A.105(2)(b) permits a trial court to issue a search warrant for the collection of blood and urine samples from a defendant, despite refusal of consent, if his violation has resulted in the death or serious physical injury of another, the defendant must be charged with an offense for the statute to apply. If the defendant is not under indictment, traditional principles of search and seizure apply.

Commonwealth v. Vincent,
70 S.W.3d 422 (2002)
(Reversing and Remanding)

The defendant and victim's history of domestic violence permits the court to consider probation for the defendant. It does not necessarily mitigate parole eligibility. The Court held that the defendant and victim's history of domestic violence permitted the trial court to consider probation as a possible penalty for the defendant. However, the defendant is not eligible for exemption for parole purposes. Because the victim's death was not in response to the domestic violence, the defendant is still a violent offender and must serve 85% of her sentence before meeting the parole board.

Keller's dissenting opinion would permit the exemption for both probation and parole. ■

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6th Circuit Review

Emily Holt

Scott v. Collins
286 F.3d 923 (6th Cir. 3/25/02)

In this case, the 6th Circuit provides further guidance on the application of the 1-year statute of limitations imposed by 28 U.S.C. § 2244(d). Scott was convicted in Ohio state court of murder, rape, and assault. He filed timely direct appeal and state post-conviction motions, and ultimately petitioned for a writ of habeas corpus in federal district court. Three days after the petition was filed, the magistrate ordered the respondent to file a return of writ briefing whether Scott's petition was time-barred by the § 2244(d) statute of limitations. In its return of writ, however, respondent failed to allege that the petition was time-barred. The magistrate then issued an order explaining why the petition was time-barred, and instructed Scott to brief why the action should not be dismissed as time-barred. Scott responded with 5 reasons why the action should not be dismissed, but the district court ultimately dismissed the writ.

State Waives § 2244(d) Statute of Limitations Defense By Failing to Plead It

The 6th Circuit first holds that state waived the ability to assert a statute of limitations defense by failing to plead it. It is an affirmative defense so Fed. R. Civ. P. 8(c) requires that a party raise an affirmative defense in its first responsive pleading to avoid waiving it. This failure to plead the statute of limitations defense is even more egregious in light of the magistrate's order that Collins brief the issue.

District Court Cannot *Sua Sponte* Dismiss Petition as Time-Barred

In a second victory, the 6th Circuit holds that the district court acted improperly by *sua sponte* dismissing Scott's petition on the basis of the statute of limitations violation without the respondent asserting this defense. The Court first notes that while Fed. R. 4 Governing § 2254 Cases does permit a district court to *sua sponte* dismiss a habeas petition as an initial matter that ability expires when the judge orders that the respondent file an answer or take other action. The district court improperly cured respondent's waiver of the statute of limitations issue when it *sua sponte* dismissed Scott's petition. The 6th Circuit reverses the district court's dismissal and remands the case for consideration of the merits of Scott's claims. District Judge William Stafford, sitting by designation, dissents.

Taylor v. Withrow
288 F.3d 846 (6th Cir. 3/28/02)

Defendant Has Federal Constitutional Right to Jury Instruction on a Defense When Evidence Supports Defense Theory

Taylor was convicted of second-degree murder in Michigan state court. Taylor shot the victim, Horgrow, at a party during a fight over a woman. Taylor testified at trial that he brought a gun to the party because he was afraid Horgrow had a weapon; that he pulled the gun when he thought he was about to be attacked; and that the weapon discharged by accident. The trial court refused to instruct on the defenses of self-defense and imperfect self-defense but did instruct the jury on accident as a defense. The trial judge's rationale was that it did not matter why Taylor pulled the gun, and that testimony had been that the gun went off accidentally.

On federal habeas review, the district court granted the petition for writ of habeas corpus, finding that it was not harmless to fail to give instructions on self-defense and imperfect self-defense and Taylor's 5th and 6th amendment rights were violated. The 6th Circuit disagrees. While the right to claim self-defense is a fundamental right, there must be evidence to support this theory. "A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63-64 (1988). However, in the case at bar, there was not sufficient evidence to support the giving of a self-defense instruction. Taylor did not testify that he pulled the trigger to defend himself; rather Taylor testified that the gun went off accidentally. Under Michigan law, for an instruction on self-defense to be justified, the defendant must claim that the killing was intentional but justified. *People v. Heflin*, 456 N.W.2d 10, 19 (Mich. 1990). Taylor is claiming the killing was *unintentional.*

Judge Boggs concurs. He does not believe that the Supreme Court has held that the right to present a defense includes a right to a specific jury instruction. Thus, he would disagree that federal courts could reverse a state determination because of failure to instruct on a defense.

Sanford v. Yukins
288 F.3d 855 (6th Cir. 4/4/02)

Ms. Sanford and another woman, Carolyn Wilson, were living with one another, caring for a number of their children from prior relationships. Sanford's 9-year-old daughter was forced to have sex with Wilson's 11-year-old son while their mothers watched. Wilson encouraged the activity. Sanford did nothing to stop the act, even when her daughter yelled. At one point, Sanford left the room and returned with tea for Wilson. Both children testified that Sanford did nothing "other than be present."

Both women were convicted of first-degree criminal sexual conduct in Michigan state court. On federal habeas review the district court granted Sanford's writ of habeas corpus based on the finding that there was no evidence that Sanford "encouraged" or "assisted" the offense, an essential element of aiding and abetting. The 6th Circuit reverses.

Federal Review of Sufficiency of Evidence Claim Protected Under 14th Amendment

The Court first rejects the state's argument that this claim is not cognizable on federal habeas review. Sanford's conviction was upheld on state review because the appellate court held that there was sufficient evidence that Sanford assisted the commission of the crime by failing to act to stop the abuse. Federal review of a sufficiency argument is protected under the 14th amendment so Sanford's claim is cognizable in federal court. *Jackson v. Virginia*, 443 U.S. 307 (1979).

Federal Sufficiency Review of State Conviction: Look at Substantive Elements of Offense as Defined by State Law

The Court does conclude, however, that the district court "misunderstood the proper relationship between the roles of the federal and state courts." The sufficiency standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n. 16. "A claim that the state court misunderstood the substantive requirements of state law does not present a claim under § 2254." *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991) Thus, in the case at bar, the district court erred when it substituted its determination for that of the state courts that "assistance or encouragement" requires an overt act. "Under the 'assistance or encouragement' prong of an aiding and abetting claim, whether 'silent' presence is synonymous with 'mere' presence and whether some overt act is required to prove encouragement is a determination that properly must be left to the state courts."

"Mere Presence" is Not Equal to "Silent Presence"

The Court also notes that the district court's equation of "mere presence" with "silent presence" is incorrect. It provides an example of an aider or abettor of a bank robbery that may be silent throughout the crime's commission but may provide "moral support" nonetheless. The Michigan Court of Appealas obviously did not equate "mere presence" with "silent presence." "Rather, there are strong indications that the state court considered intentional presence and emotional support as more than 'mere presence.' It is the state's prerogative to make such a determination without intrusion by the federal courts." Thus, the district court's job was simply to make sure "whether any evidence supported the conclusion that Sanford's presence during the crimes alleged was, although silent, something beyond 'mere presence'—was, indeed, assistance and encouragement." Because there was evidence to support this conclusion—she was knowingly present during the rape, that she left and reappeared despite knowing what was happening, and she supported Wilson during the rape—the grant of habeas relief is reversed.

Moss v. Hofbauer
286 F.3d 851 (6th Cir. 4/12/02)

Moss received a sentence of life imprisonment without the possibility of parole for the murder of Darrell Manley. The circumstances surrounding the murder are confusing, with the confrontation stemming from a dispute over a gun, two series of shots fired, and with three possible shooters of the victim: Moss, co-defendant Gould, and co-indictee Thomas. Thomas plead guilty prior to trial. On federal habeas review, the court is reviewing whether trial counsel for Moss was ineffective.

Ineffective Assistance of Trial Counsel Claims: Apply *Cronic* Standard Only When Counsel is "Physically or Mentally Absent"

The Court first notes that it will apply the *Strickland* standard of evaluation to trial counsel's performance at trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *U.S. v. Cronic*, 466 U.S. 648 (1984) is inapplicable because the "constructive denial of counsel and the associated collapse of the adversarial system" is not "imminently clear." The Court states "Modelski's [trial counsel] performance as counsel, good or bad, was clearly not the equivalent of being physically or mentally absent."

Trial Counsel Not Ineffective by Not Making an Opening Statement

Moss first asserts that trial counsel was ineffective for failing to make an opening statement. She opted to reserve the right to make an opening statement but never exercised that right. Counsel for Moss' co-defendant made an opening statement in which he discussed many of the issues that Modelski would have addressed, like the burden of proof and the witness credibility. An opening statement was not later justified, at the close of the government's proof, because Moss presented no defense. Finally, even if this was not a strategic decision, and was unwise, Moss has offered no proof as to how an opening statement would have resulted in a different trial outcome.

Trial Counsel Not Ineffective When It Did Not Cross-Examine Key State Witnesses

Moss also claims that Modelski was ineffective for failing to cross-examine 2 of the government's key witnesses. The dissent would find that counsel was ineffective in this regard. Freeman and Purdie were eye-witnesses to the shooting. Freeman testified that he heard Moss say to Gould, as the two men were fleeing the murder scene, "He is dead, man, I killed him." Purdie identified Moss as the shooter. Specifically Moss claims that as to Freeman, counsel should have

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cross-examined him as to the possibility of misidentification as Freeman was drinking when he saw Moss and Gould run by his apartment. As to Purdie, Moss says that Modelski should have cross-examined her on the following grounds: (1) her testimony was inconsistent because she testified that she could not see Manley when he fell yet also claims she saw him moving on the ground and trying to get up; (2) her account conflicts with the medical examiner's testimony that there was no evidence of close range firing; (3) she may have misidentified Moss and Gould because they look alike; and (4) she may have been biased as she was a friend of Manley's.

The Court finds that the decision not to cross-examine Freeman was strategic as Modelski said that she thought his testimony was unbelievable and that cross-examination would simply highlight Moss' admission. The dissent would find ineffective assistance because of its speculation that Freeman could have misheard the alleged admission. The Court dismisses this as a hypothetical. The Court does find fault with failure to cross-examine Purdie. Modelski testified that she did not cross-examine her because Gould's attorney had. However, Gould and Moss would have different incentives to cross-examine Purdie. Purdie did not even see Gould at the scene. "Modelski's decision not to cross-examine Purdie was not a reasonable strategic decision entitled to deference." However, Moss has failed to show a reasonable probability in a different outcome if Modelski had cross-examined Purdie. The majority criticizes the dissent's position that Moss has established this by stating that the dissent relies only on speculation regarding benefits of cross-examination.

Strong Dissent by Judge Clay

Judge Clay strongly dissents. He believes *Cronic*, *supra*, should have been applied to the case, but argues that even under *Strickland*, *supra*, Moss has established prejudice sufficient for reversal. He notes that the majority fails to focus on counsel's *inaction*. He finds "Modelski's performance so deficient that it amounted to nothing more than formal compliance with the Constitution such that Petitioner was left with no counsel at all."

Stapleton v. Wolfe
288 F.3d 863 (6th Cir. 4/22/02)

Admission of Non-Testifying Co-Defendant Statements Not Harmless Error

This case deals with the admission of a non-testifying co-defendant's statements. The Court determines that error was not harmless and grants a writ of habeas corpus.

Stapleton, Foreman, and Studer were implicated in 2 home burglaries. Studer gave 2 statements to police before Stapleton's trial. In one statement, he said that he remained in the car while Stapleton and Foreman burglarized one home, but he was not involved in the second burglary although Stapleton and Foreman were. In the second statement, he acknowledged active participation in the second burglary.

At Stapleton's trial, Studer was called to the stand by the prosecution. Studer said he could not remember the burglaries and he did not remember making statements to police. He said that Stapleton would not have been with him during the burglaries. The prosecution sought to admit Studer's prior statements. Defense counsel properly objected. The trial court delayed the decision until Foreman testified. Foreman said that Stapleton participated in both robberies. The judge said that because Foreman corroborated Studer's out-of-court statements, they should be admitted.

No "Adequate Indicia of Reliability"

Statements made by non-testifying accomplices are presumptively unreliable and admission violates the confrontation clause. For such statements to be admitted, the prosecution must show there is an "adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Studer statements bear no indicia of reliability. The statements were not against Studer's interest and inculpated Stapleton. Stapleton's confrontation clause rights were violated.

Harmless Error Analysis: Were Statements Cumulative?

The Court also concludes that admission of the Studer taped interviews was not harmless error. The statements were important to the prosecution's otherwise weak case, and defense counsel never had the opportunity to cross-examine Studer about his statements.

The pivotal inquiry is thus whether the statements were cumulative. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The Court determines that they were not by looking to *Arizona v. Fulminante*, 499 U.S. 279 (1991). In that case the Supreme Court rejected a claim that harmless occurred when a coerced confession and a non-coerced confession were admitted at trial. The jury "might have believed that the two confessions reinforced and corroborated each other. . .For this reason, one confession was *not* merely cumulative of the other." *Id.*, 299 U.S. 279 at 299. Thus, the admission of the statements infected the entire verdict and error is not harmless.

Calvert v. Wilson
288 F.3d 823 (6th Cir. 4/24/02)

Another Case Where Admission of Non-Testifying Co-Defendant Statements Not Harmless Error

Calvert and Erwin Mallory were charged with robbery and murder. At Calvert's trial, the prosecution introduced a statement given by Calvert hours after his arrest. In it he said that he spent the afternoon of February 4, 1996, drinking and playing cards with Bennett, the victim. He left and eventually wound up at Cindy Chalfant's apartment, which was next

door to Bennett's apartment. Mallory knocked on the door and asked Calvert to go with him to Bennett's who had ripped Mallory off of $100 the night before. Bennett, upon seeing Mallory, used a racial epithet and ordered him out. All of the men were drunk. Mallory pulled a hatchet out of his jacket and hit Bennett on the back of the head. He stopped, then started using a stick to hit Bennett when he heard Calvert and Chalfant talk about getting him out of the apartment. Finally, he took a butcher knife and slashed Bennett's throat from behind. Calvert told Mallory he was crazy and then fled the scene. Bennett was still alive. Calvert had blood all over him. He eventually returned to his home, but, the next morning, took a cab to Bennett's apartment where police found him in blood-soaked clothes. Calvert said he did not know of Mallory's plans to kill Bennett.

At Calvert's trial, Mallory asserted his privilege against self-incrimination and refused to testify. Over defense objection, the prosecution played a confession given by Mallory after his arrest. Mallory's version of events was that the day before the murder he and Bennett had gotten into a fight. The next evening Mallory, Bennett, and Calvert were playing cards when Mallory and Calvert left and armed themselves with weapons to kill Bennett. The two men attacked Bennett. Mallory said Calvert slashed Bennett's throat. The two then left. Mallory disposed of the weapons.

Bennett's grandson testified at trial that on the day of the murder Bennett said Mallory had threatened him with a butcher knife. Bennett's grandson knew Mallory but had never heard of Calvert.

Bennett died of the multiple stab wounds, not the slashing of his neck. Calvert was convicted by the jury as charged. On federal habeas review, the district court found that Calvert's confrontation clause rights were violated by the admission of Mallory's statement but that any error was harmless. The 6th Circuit reverses.

Indicia of Reliability:
Must Result from Inherent Trustworthiness of Statement, Not By Reference to Other Evidence

To be admissible, Mallory's statements must bear adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 63-66 (1980). In *Lee v. Illinois*, 476 U.S. 530, 545 (1986), the U.S. Supreme Court held "when the discrepancies between [co-defendant's statements] are not insignificant, the codefendant's confession may not be admitted." In *Lilly v. Virginia*, the Supreme Court made its distaste for non-testifying co-defendant confessions even more obvious. It stated that co-defendant confessions do not come within a firmly rooted hearsay exception. Particularized guarantees of trustworthiness are required for a confession to be admissible. However, the Court rejected the notion that corroborating evidence provides a particularized guarantee of trustworthiness. The statement "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822 (1990). Furthermore, a self-inculpatory confession is not trustworthy. "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Lilly*, 527 U.S. at 133.

In determining whether there are particularized guarantees of trustworthiness, a court should look to the circumstances surrounding the making of the statement. Where the statements made under the control of the government? Were the statements subject to cross-examination? In the case at bar, no guarantees of trustworthiness surrounded the making of Mallory's statement. He was in custody and was answering police leading questions. There was no cross-examination. The Court notes that the trial court's determination that there was particularized guarantees of trustworthiness is "contrary to" Supreme Court precedent in *Lee* and *Wright*, and the fact that *Lilly* was not decided until 1999 does not matter.

The error in admitting this statement was not harmless. "Prior calculation and design" had to be proven by the state from Mr. Calvert to be convicted of first-degree murder. The jury did not hear from anyone but Mallory that Calvert caused the death of Bennett with prior calculation and design. Without Mallory's confession, the jury would have had to infer Calvert's guilt.

Sharp Criticism of State in Judge Cole Concurrence

Judge Cole concurs. He believes that the Court should not have even performed harmless error analysis as the respondent did not bother to make this argument in its return of writ. "This Court should not, as a matter of policy, encourage poorly planned lawyering or improper strategy, nor should this Court to do the respondent's job for him by raising harmless error where he has failed to do so appropriately."

Schoenberger v. Russell
2002 WL 924743 (6th Cir. 5/9/02)

No Ineffective Assistance of Trial Counsel Where No Objection to State Witnesses' Testimony Bolstering Veracity of Victims' Sex Abuse Claims

Schoenberger was convicted of 2 counts of gross sexual imposition and 2 counts of rape in Ohio state court. The charges stemmed from alleged sexual contact with his 2 step-daughters, both of whom were less than 13. There was no physical evidence and no eyewitnesses. Schoenberger denied the acts.

At trial, Donna Bukovec, Nancy Nicolosi and Sheryl Smith testified for the prosecution. Bukovev was a social worker with social services said she first investigated claims in 1984 and both girls denied the abuse. In 1985, the allegations were again investigated and that at that time she found the charges

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substantiated as to Tracey. She said that she believes that Tracey was telling the truth. Nicolosi was a probation/diversion counselor at juvenile court. She specialized in sex abuse cases. She said she believed Tracey. Smith was an investigator for child services. She said she thought Tracy was telling the truth. None of the witnesses' testimony was objected to by defense counsel.

The Court rejects Schoenberger's claims that the admission of the statements concerning the veracity of the girls violates due process and the right to a fair trial. The statements were "invited" by defense counsel's questioning of the witnesses. The Court notes that it was trial strategy to ask the questions in an attempt to prove (1) that Tracey's statements are all that establishes that sex abuse occurred and (2) her credibility may very well have been affected by drug or alcohol abuse. That is why no objections occurred. This obvious trial strategy also disproves Schoenberger's claim that trial counsel was ineffective by not objecting.

Concurrences: When No State Adjudication of Merits, Federal Court Should Review Claims *De Novo*

Judge Keith files a concurring opinion. In this case the Ohio appellate courts failed to consider petitioner's properly raised federal claims. Keith believes that when there is no state "adjudication of the merits," pre-AEDPA law should be applied and the federal claims should be reviewed *de novo*. This is in direct contradiction to the prior case of *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001) which Keith believes was incorrectly decided. Judge Moore also concurs on this issue, noting that the 6th Circuit needs to consider this issue *en banc*. ■

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CAPITAL CASE REVIEW

United States Supreme Court

Kentucky Supreme Court

***McKinney v. Commonwealth*, Ky., 60 S.W.3d 499 (2001)**
Majority: Graves (writing), Lambert, Cooper, Keller and Stumbo
Minority: Johnstone (writing), Wintersheimer

On Direct Appeal

Lay Witness Testimony

The testimony of ten witnesses relating to McKinney's lack of reaction to the deaths of his family in a fire at the family home was just as consistent with innocence as with guilt and proper.

Expert Witness Testimony

Defense testimony regarding McKinney's diagnosis with Schizoid Affective Disorder relevant to explain his lack of reaction to the deaths of his family was improperly excluded.

Psychological and School Records of Witness

The trial court erred when it did not permit defense access to Comp Care or school records showing that witness Owens was not the meek, scared individual he appeared to be as a witness, but someone with an aggressive disorder, mild mental retardation, difficulty understanding certain concepts and mild hearing loss.

The Court did not reach whether the records were exculpatory because Owens had signed a release. The lesson for trial and post-conviction practitioners is to gain releases from witnesses, if possible.

Other Issues

The Court examined other issues but made no new law.

Dissent

The dissent felt the trial court had carefully examined the issue of expert testimony on McKinney's lack of reaction and did not abuse his discretion in disallowing the testimony.

***Taylor v. Commonwealth*, Ky., 63 S.W.3d 151 (2001)**
Majority: Johnstone (writing), Lambert, Wintersheimer, Graves, Cooper
Minority: Keller (writing), joined by Stumbo
Stumbo (writing)

Denial of RCr 11.42 Motion

Admissibility of George Wade's Confession

Taylor argued that the court should reconsider the admissibility of non-testifying co-defendant George Wade's confession in light of the United States Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). In that case, a plurality held that the "statements against penal interest exception to the hearsay rule" was not firmly rooted in the Constitution for Confrontation Clause purposes. However, the court left open the question of whether certain statements against pe-

nal interest could be admitted pursuant to the second prong of *Ohio v. Roberts*, 448 U.S. 56 (1980)—"that the statement bore sufficient indicia of reliability by virtue of its inherent trustworthiness."[1]

The Kentucky Supreme Court picked up on this open question in finding that it was unclear whether, and to what extent, *Lilly* changed the law. *But see Calvert v. Wilson*, 288 F.3d 823 (6th Cir. 2001) ("The [Supreme] Court made clear that it was merely making explicit in *Lilly* what was implicit in earlier cases"). Lastly, the Court felt, Taylor's argument was a request that the Court reexamine an issue already addressed on direct appeal and that the "law of the case doctrine"[2] should apply.

***Batson/Swain* Argument**

Taylor's direct appeal argument citing *Batson v. Kentucky*, 476 U.S. 79 (1986), cannot now be argued in post-conviction by citing the different standard in citing *Swain v. Alabama*, 380 U.S. 202 (1965). Under either standard, Taylor presented no evidence that the Jefferson Commonwealth's Attorney's Office had a systematic practice of excluding African-Americans from criminal juries practice.

***Brady* Claims**

Taylor presented no evidence proving his various *Brady* claims.

Ineffective Assistance of Counsel

Taylor presented twenty-four claims of ineffective assistance of trial counsel, on 23 of which the Court broke new legal ground.

Underwear belonging to both victims inexplicably disappeared prior to trial. Defense counsel moved to dismiss sodomy charges against Taylor since the loss of the underwear resulted in the loss of evidence which Taylor had a right to have tested, and in potentially exculpatory evidence. Counsel, did not seek a lost evidence instruction. However, since the use of a missing evidence instruction was first approved in *Sanborn v. Commonwealth*, 754 S.W.2d 534, 539 (1988), some four years after Taylor was tried, counsel's failure to anticipate that the law would change was not ineffective assistance of counsel. Furthermore, the effect of such an instruction, especially in light of the amount of evidence pointing to Taylor, "is pure speculation." *Taylor*, *supra*, 63 S.W.3d at 165.

Keller Dissent

Justice Keller agreed with the Court's statement that *Lilly*, *supra*, did not render *Taylor I* erroneous because *Taylor I* "was wrong the day it was rendered, it is wrong today, and it will remain wrong tomorrow." *Taylor II*, 63 S.W.3d at 169.

Further, the Justice noted the Court's own recognition that the "law of the case doctrine" "has sufficient flexibility to" permit an appellate court to correct an error "when a substantial injustice might otherwise result and the former decision is clearly and palpably erroneous." *Id*. In other words, unlike *res judicata*, the "law of the case" is a discretionary doctrine, especially in light of the human life at stake.

Stumbo Dissent

Justice Stumbo believed that Taylor had made out a prima facie case of intentional exclusion of African-Americans under either *Swain* or *Batson*. The amount of evidence Taylor presented was on a par with that presented in *Love v.* Jones, 923 F.2d 816 (1991). The majority's cite to Taylor's *Batson* claim had "absolutely no analysis" which would allow anyone to figure out in which direction the Court was heading.

SIXTH CIRCUIT COURT OF APPEALS

***Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001)**
Three judge opinion: Siler (writing), Boggs, Cole

***Morgan V. Illinois*[3] Issues**

Assuming only for the sake of argument that Stanford was entitled to the benefit of *Morgan v. Illinois*, 504 U.S. 719 (1992)[4], the panel found that because "counsel was not precluded from asking life-qualifying questions during general voir dire, Stanford is not entitled to habeas relief."[5] *Stanford*, 266 F.3d at 453.

It is interesting to note that the Kentucky Supreme Court denounced group voir dire as a forum for death-qualification, only one year after admonishing Stanford that he should have sought to ask death-qualification questions in group voir dire. *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989) The same court, in *Grooms v. Commonwealth*, Ky., 756 S.W.2d 131 (1988), just one year earlier, had made it clear that jurors predisposed to vote for the death penalty were not qualified jurors.

The panel also found that Stanford had met neither *Strickland v. Washington*, 466 U.S. 668 (1984) prong: 1) that counsel's performance was deficient; and 2) that the deficient performance was prejudicial. By premising the right to do so upon request, *Morgan* itself suggests that there are times when a trial counsel's strategy may require that he/she not do so. Because the presumption is that counsel was effective—that strategy may have required Stanford's counsel **not** to ask life-qualifying questions—Stanford did not meet the deficient performance prong. However, the panel ignored the fact that no evidentiary hearing was granted in either state or federal court.

Stanford also did not meet the prejudice prong. There was no evidence that a juror inclined to always sentence capital defendants to death sat in judgment of Kevin Stanford. Again, it must be remembered that no evidentiary hearing was granted, at which evidence affirming or denying the allegations could be heard.

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Bruton Claim

Citing the "overwhelming evidence" of Stanford's guilt, the panel agreed with the district court that the admission of Stanford's non-testifying co-defendant's confession was harmless error.

However, the panel did not address the question of whether a *Bruton* error could be harmless in the mitigation phase.

Enmund Claims

The panel found that Stanford had no standing to object to the trial court's decision that his co-defendant Buchanan was not eligible for the death penalty. Although Buchanan received a windfall in a finding that he was not eligible for the death penalty, Stanford was not unfairly prejudiced. There was overwhelming evidence of Stanford's guilt, including the testimony of a third co-defendant.[6]

Other Issues

The panel's other analysis plowed no new ground.

Endnotes

1. The Kentucky Supreme Court believed on direct appeal that Wade's statement was properly admitted under the second *Roberts* prong.
2. "[A]n opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been." *Union Light, Heat and Power v. Blackwell's Administrator*, Ky., 291 S.W.2d 539, 542 1956).
3. Stanford presented three issues dealing with *Morgan v. Illinois* to the Sixth Circuit: 1) whether the trial judge had committed constitutional error by refusing to ask reverse-*Witherspoon* questions; 2) whether trial counsel were ineffective in failing to life-qualify the jury during general voir dire; and 3) whether Stanford was entitled to the retroactive application of *Morgan*
4. The panel "left for another" day the question of whether *Morgan* was indeed retroactively applicable to Stanford's case.
5. The Supreme Court of Kentucky "[had] not disagree[d] that [Stanford] had a right to life-qualify the jury," but instead found the issue barred because counsel never asked any life-qualifying questions in general voir dire, and never sought to ask those questions. *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781, 786 (1987).
6. That co-defendant, Troy Johnson, the eldest of the three juveniles, turned state's evidence during the juvenile proceedings in this case, and had served out his nine-month sentence at a juvenile facility by the time Stanford and Buchanan were tried in September 1982. ■

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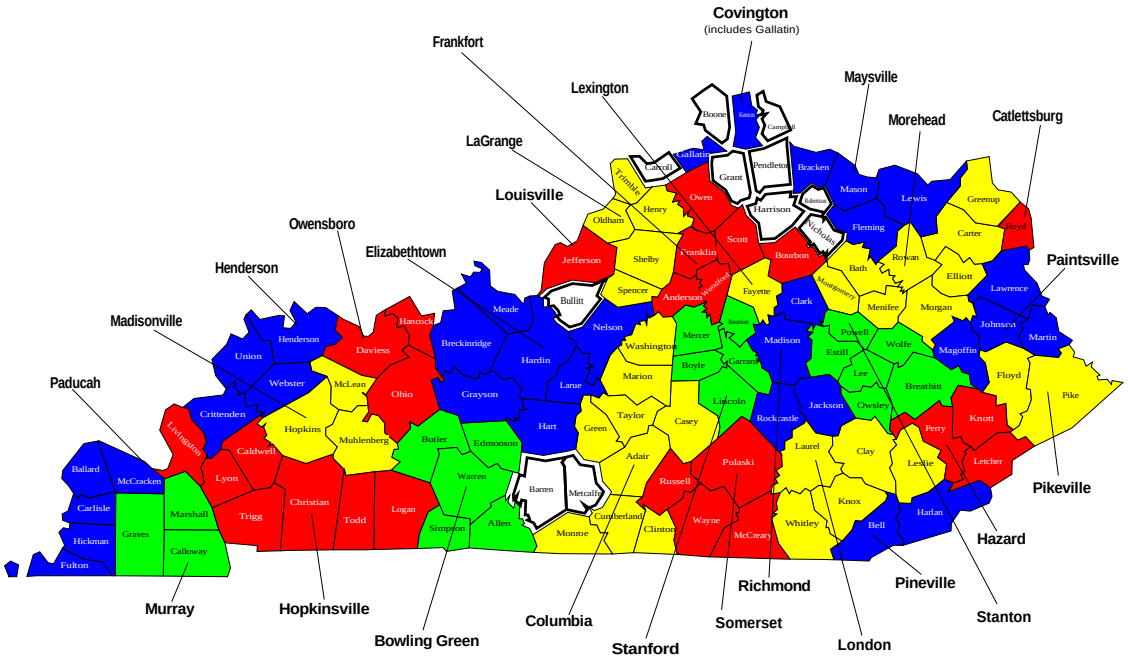

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Commonwealth v. Morriss
70 S.W.3d 419
(Ky., 3/21/2002)

The Supreme Court has written a third opinion on when a search warrant may issue to take blood or urine samples from someone involved in a DUI accident. In *Combs v. Commonwealth*, Ky., 956 S.W. 2d 161 (1998), the Court held that evidence seized in execution of a search warrant should have been suppressed under KRS 189A.105(2)(b) where an accident occurred in which no one was killed or suffered a physical injury. Thereafter, in *Commonwealth v. Lopez*, Ky., 3 S.W. 3d 351 (1999), the Court held that neither the statute nor *Combs* applied where the defendant was charged with DUI and consented to a blood test.

In this case, the defendant had an accident in which one passenger was killed and another injured. A search warrant was obtained prior to the defendant being charged. His blood and urine samples showed that he was intoxicated. The Jefferson Circuit Court granted a motion to suppress. The Court of Appeals affirmed. The Supreme Court sent the case back to the Court of Appeals to reconsider in light of *Lopez*. The Court of Appeals again affirmed, finding *Lopez* inapplicable.

The Supreme Court, in a unanimous decision written by Chief Justice Lambert, reversed the Court of Appeals. The Court held that because there was no charge at the time of the issuance of the search warrant, KRS 189A.105 did not apply. The Court synthesized the three fact situations thusly: "Where there is death or physical injury and the subject has been charged with a qualifying offense, if there is a refusal the statute applies and a search warrant may be obtained. However, where there is death or physical injury but no charge has yet been brought, 189A.105(2)(b) does not apply and traditional search and seizure principles control." The Court remanded the case to the trial court "for a determination of whether the search warrant was otherwise proper."

Commonwealth v. Neal
2002 WL 471217
(Ky. App., 3/29/2002)

A Louisville Police Officer went to serve an arrest warrant on Lawrence Neal. The officer knocked on Neal's security door first. Receiving no answer, he opened the security door and began knocking on the inner door. The door cracked open 6-8 inches. The Officer yelled "police" several times, at which point Latterance Neal appeared. The officer asked Latterance Neal if he could step inside, that he was there to serve a "serious" warrant on Lawrence Neal. Latterance Neal allowed the officer to look around the house. While in the living room, the officer saw a black and red jacket. Latterance Neal denied it was his, and then told the officer he could search the jacket. The officer found a .380 semi-automatic pistol. An identification card was also found. Laterrance and Lawrence Neal were arrested, Laterrence for hindering apprehension. Later, Laterrance was charged with possession of a handgun by a convicted felon. The trial court suppressed the evidence of the handgun under *United States v. Litteral*, 910 F. 2d 547 (9th Cir. 1990) and *Bumper v. North Carolina*, 88 S.Ct. 1788; 20 L.Ed.2d 797; 391 U.S. 543 (1968). The Commonwealth took an interlocutory appeal to the Court of Appeals.

The Court vacated the decision of the trial court and remanded the case in a decision written by Judge Johnson and joined by Judges Dyche and Knopf, In *Bumper*, the Court stated that "'when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

The Court found *Bumper* distinguishable because the officer had stated that he had a valid arrest warrant for Lawrence Neal. However, the Court found that a remand was necessary to find whether Laterrence Neal's consent was voluntary or not. "On remand, the trial court should make a specific finding of fact based on a preponderance of the evidence from the totality of all the circumstances as to whether Laterrence's consent to search the jacket was freely and voluntarily given."

Carrier v. Commonwealth
2002 WL 1000742
(Ky. App., 5/17/2002)

The County Attorney of Livingston County moved the Livingston District Court for records in the possession of a Dr. John Runyon regarding one of his patients, Clifford Carrier. The motion stated that Carrier had told his wife that he had confessed to his psychologist to having sexually abused his children. The court granted the motion, the records were obtained, and used to obtain an indictment. Carrier then moved in limine to exclude the statements alleging that they

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were obtained illegally and in violation of privilege. The motion was denied, and the defendant entered a conditional plea of guilty.

The Court of Appeals, in an opinion written by Judge Schroder and joined by Judges Combs and Johnson, affirmed the decision of the circuit judge overruling the motion in limine. The Court acknowledged that the motion of the County Attorney had been "the equivalent of a request for a search warrant." The Court analyzed the issue from a Fourth Amendment perspective. "[S]o long as there was probable cause to execute the search warrant…which there was in this case (the wife's claim that appellant had confessed the acts to Dr. Runyon), Dr. Runyon could not legally resist the order to seize the records and the records could thereafter be used to support an indictment." Accordingly the Court ruled that the records had been obtained legally. The Court ultimately also held that under *Mullins v. Commonwealth*, Ky., 956 S.W. 2d 210 (1997), the duty to report in KRS 620.030 overrides the profession-client/patient privilege of KRE 504 (the marital privilege in that case). The Court held that the "same rationale holds true relative to the psychotherapist-patient privilege."

United States v. Pelayo-Landero
285 F.3d 491
4/2/02

The Tennessee Bureau of Investigation developed probable cause to search a particular mobile home. They obtained a search warrant, and ultimately executed the warrant, entering through an unlocked screen door 3-4 seconds after having yelled, "Police, search warrant." Several handguns were located in addition to marijuana and an SKS rifle, counterfeit alien registration receipt cards, a counterfeit Social Security card, and several other items. The defendant was arrested and charged with a series of federal offenses. His motion to suppress was denied, and he entered a conditional plea of guilty.

The Sixth Circuit affirmed the denial of the motion to suppress in an opinion written by Judge Jones and joined by Judges Daughtrey and Nelson. The Court ruled that there was a sufficient description of the mobile home to meet the particularity requirement despite some minor errors. "Here, the particularity requirement is met as the description includes specific directions from an identifiable point to the mobile home park…Once inside the park, the warrant describes the particular trailer by color, by a certain exterior trim, and by a wooden deck…additional circumstances indicate that there would not have been a mistaken search of other premises. Agent Hannon was the team leader at the search. He had prepared the affidavit incorporated into the warrant…It appears that all reasonable steps were taken to ensure that there could not be a mistaken search of other premises here."

The Court also held that no violation of the knock and announce law occurred here. The Court ruled that the 3-4 seconds wait was reasonable under the circumstances. "The officers knocked on the door and announced their presence and authority, s well as their purpose to execute the search warrant. Following this announcement, they waited three to four seconds before entering the unlocked screen door. The officers were justified in their actions because they knew that at least one firearm was present in the home, that there were drugs in the home that could have easily been disposed of, and that there might have been a homicide suspect in the home."

SHORT VIEW . . .

1. *State v. Geraw*, 795 A.2d 1219 (3/15/02). The Vermont Supreme Court has relied upon the Vermont Constitution to rule that the police need a warrant to make a surreptitious recording of a person's statement inside his own home. Here, police detectives went to the defendant's home and recorded his statements to them without his knowledge. The Court held that it was reasonable for Geraw to "expect that conversations in the privacy of one's home would not be surreptitiously invaded by warrantless transmission or recording…From the standpoint of the citizen secure in the privacy of his or her home, nothing changes merely because the party spoken to is a police officer rather than the officer's secret alter ego…Any Vermonter who sits around the kitchen table conversing—as defendant did here—has a reasonable right to expect that he or she is not being secretly monitored or recorded. Our 'sense of security' in face-to-face conversations inside our homes extends at least this far."

2. *State v. Mack*, 66 S.W.3d 706 (Mo. 2/13/03). In a curious decision, the Missouri Supreme Court has held that although drug checkpoints violate the Fourth Amendment under *Indianapolis, Ind. v. Edmond*, 121 S.Ct. 447; 148 L.Ed.2d 333; 531 U.S. 32 (2000), stopping all motorists who leave a highway upon reading a sign indicating that a drug checkpoint is imminent is not unconstitutional. Drivers who left the highway were stopped and asked for permission to search. If permission was denied, the officers used a drug sniffing dog to smell the outside of the car. In this case, the defendant gave permission to search, and methamphetamine was found. The Court found *Edmond* not controlling by viewing the act of leaving the highway to be indicative of a reasonable suspicion. "[E]ven if the deceptive drug checkpoint scheme did not alone constitute 'individualized suspicion,' defendant's particular conduct in exiting at the checkpoint must also be considered."

3. *State v. Carty*, 790 A.2d 903 (3/4/02) *modified by State v. Carty*, 2002 WL 788754 (4/29/2002) The New Jersey Supreme Court has decided as a matter of state constitu-

tional law that a reasonable suspicion is required before an officer may request a driver for his consent to search his car. The stated reason for the holding is to address "the problems caused by standardless requests for consent searches of motor vehicles lawfully stopped for minor traffic offenses." One will recall that New Jersey has experienced some of the most serious problems with racial profiling in the country. "[U]nless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional. A suspicionless consent search shall be deemed unconstitutional whether it preceded or followed completion of the lawful traffic stop."

4. *Bolden v. Commonwealth*, 561 S.E.2d 701 (Va. 4/19/02). A police officer was having a conversation with a person in a hotel lobby when the defendant received a phone call. The police officer answered the call. Later the officer blocked the defendant's car in the parking lot. Thereafter, the defendant consented to a search of a suitcase in the trunk of his car, revealing marijuana. The Court held that the answering of the phone and the blocking of the car revealed that the defendant had been seized, requiring reasonable suspicion. Because there was no reasonable suspicion, the defendant's consent was a fruit of the poisonous tree, requiring suppression of the marijuana.

5. *United States v. Holloway*, 2002 WL 970709 (11th Cir. 5/10/02). The receipt of a 911 call reporting gunshots constitute exigent circumstances sufficient to justify the entry into the home without a warrant. Even though the defendant had been firing the weapon into the air to scare persons who had been throwing rocks at his house and horses, the Court found the circumstances known to the police to be dire enough to justify a warrantless entry into a home, resulting in a conviction of being a felon in possession of a firearm. In reaching the holding, the Court distinguished *Florida v. J.L.*, 120 S.Ct. 1375; 146 L.Ed.2d 254; 529 U.S. 266 (2000), which had held that the anonymous tip of a person at a particular place with a gun did not provide a reasonable suspicion sufficient to justify a seizure of the person. "A crucial distinction between *J.L.* and this case is the fact that the investigatory stop in *J.L.* was not based on an emergency situation." The Court stressed that 911 calls are vital to law enforcement, and that if law enforcement "could not rely on information conveyed by anonymous 911 callers, their ability to respond effectively to emergency situations would be significantly curtailed." ■

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Juvenile Executions since reinstatement of the death penalty in 1976

- The United States leads the world with 18 executions of juvenile offenders;
- Of those 18, 10 of were in Texas.

Juveniles Currently Under of Sentence of Death in US

- Over 80 juveniles are under a sentence of death in the US
- Kentucky has 1 on death row
- Texas has 30

Kentucky 's Juvenile Death Penalty

- Kentucky has killed 6 people who were juveniles when the offense was committed
- 4 of those 6 were black
- There is 1 currently on death row
- There are 4 cases pending trial where death is being sought for a juvenile:
  1 in Whitley County and 3 in Jessamine County

The Validity of Uncounseled Admissions and Waiver of Counsel by Juveniles: How to Litigate Well for Juvenile Clients in Light of *D.R.* and HB 146

In January of this year, the Kentucky Court of Appeals published a decision that has had a great impact on juvenile courts that were not routinely appointing public defenders.

In a case involving a status offender, the Court of Appeals made a blanket statement that a child could not waive counsel without first conferring with counsel. *D.R., a Minor Child v. Commonwealth*, Ky., 64 S.W.3d 292 (2001). *D.R* was a case in which a child admitted to beyond control, without advice of counsel. D.R was placed on probation (still without counsel) and counsel was only appointed at a subsequent hearing when the juvenile court thought it might ultimately revoke probation. The trial attorney, DPA Stanford Field Office lawyer, Karen Mead objected to the revocation of her client's probation, because the child had not originally had counsel present to advise him when he entered his admission.

In light of *D.R.*, many courts changed their standard practice and started routinely appointing counsel. Other courts viewed *D.R.* only as a Court of Appeals case and continued to permit waiver by the child awaiting further guidance from a statute or Supreme Court opinion.

Recently a new law took effect which impacts this issue. House Bill 146 limits *D.R.* so that a child may waive counsel if the child is not admitting to a felony, a sex offense or an offense where commitment or detention will be imposed if the court makes an inquiry and findings regarding waiver of counsel. House Bill 146 amends KRS 610.060 by adding the following section:

> (2) (a) No court shall accept a plea or admission or conduct an adjudication hearing involving a child accused of committing any felony offense, any ***offense under KRS Chapter 510, or any offense for which the court intends to impose detention or commitment as a disposition unless that child is represented by counsel.***
> ***(b) For a child accused of committing any other offense, before a court permits the child to proceed beyond notification of the right to counsel required by paragraph (a) of subsection (1) of this subsection without representation, the court shall:***
> ***1. Conduct a hearing about the child's waiver of counsel; and***
> ***2. Make specific findings of fact that the child knowingly, intelligently and voluntarily waived his right to counsel.***

HB 146 also amends KRS 610.060(1) to provide that waivers be conducted in accordance with the new provision. An emergency provision made the new law amended by House Bill 146 effective as soon as the Governor signed it, which was April 5, 2002.

Since the passage of HB 146, the United States Supreme Court has limited even further the circumstances when a sentence can be imposed without counsel. In *Alabama v. Shelton* ____U.S. ____, 122 S.Ct. 1764 (2002) the defendant represented himself and at no time was offered assistance of counsel at state expense. The United States Supreme Court found that a suspended sentence that may "end in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution of the crime charged. The United States Supreme Court specifically rejected the argument that the appropriate rule was to permit an uncounseled prosecution, and only appoint counsel (if at all) at the probation revocation stage. This, the Supreme Court found, would "unduly reduce the Sixth Amendment's domain."

Taken together, these new cases and statutes leave little doubt that Kentucky's juvenile courts are required to appoint counsel for a child any time that child's liberty is in jeopardy.

House Bill 146

Under HB 146, the court is generally required to appoint counsel for any juvenile whose liberty is in jeopardy. Therefore, before a court may accept a waiver of counsel, it must do the following:

1. Determine Eligibility: The trial court must first find of record that the case is not "offense under KRS Chapter 510, or any offense for which the court intends to impose detention or commitment as a disposition." Such a finding would be a condition precedent to accepting a waiver of counsel, and would therefore be binding on the court in subsequent proceedings.

KRS 610.060 can be utilized anytime a child's liberty interest is being restricted due to a prior uncounseled admission. *Shelton* prohibits the court from retrospectively undoing its original finding that the child's liberty interest was not at stake. If the proceedings may "end in the actual deprivation of a person's liberty" – meaning everything from probation to detention to commitment – then the court is required to provide counsel for the child.

Consequently, contempt hearings that are based on uncounseled admission may be challenged under the new language of KRS 610.060(2)(a) and *Shelton*. The amended statute may also be utilized when the uncounseled admission is relied upon to decide a disposition on a subsequent adjudication. You can not only argue that it cannot be considered, but even in some cases you may want to request recusal to insure that it is not a factor in a decision which impacts liberty of the child.

2. Establish Knowing, Voluntary and Intelligent Waiver: The trial court must conduct a hearing regarding whether the child is waiving counsel, and the trial court must make findings that **any** waiver is knowingly, intelligently and voluntarily made. This section limits the application of *D.R.*, which held that a child could not waive counsel unless that child had FIRST conferred with counsel. However, HB 146 still requires that such a waiver of counsel be made in a "knowingly, intelligently and voluntarily" manner. In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the court concluded that unlike other rights, the right to counsel cannot simply be "waived." Rather, one who chooses to waive counsel has, by definition, chosen to represent himself. Before the court can accept such a choice, "[the child] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta, supra*, 95 S.Ct. at 2541.

The hearing regarding waiver of counsel must inform the child that they are waiving the right to assistance in preparing their defense, that they would have the right to remain silent, to present witnesses on their behalf, and that they have the right to a public defender if they or their parents cannot afford one. The child must understand what they are waiving, and to do so, they must either confer with counsel (as *D.R.* states) or the court must make a careful inquiry as to their **the child's** understanding of what they are waiving. The inquiry must be a meaningful inquiry, and not just a boilerplate perfunctory formality. A child cannot knowingly waive legal principles which they may not understand, such as the right to remain silent, the right to present witnesses and the right to present a defense. Children do not have the same level of comprehension as adults regarding these rights, and this is the reason that the court must assure that the child understands what they are waiving. Thus, an inquiry into a child's understanding of the exact legal rights that they are waiving must be made in a detailed and specific manner by the court.

Continuing Application of D.R.

I. Admissions Still Governed by *Boykin v. Alabama*

The amended statute does not cure all potential defects that may occur when an unrepresented child makes an admission. Regardless of what our Kentucky statutes mandate about waiver of counsel, *D.R.* makes clear that admissions are still governed by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). *D.R.*, at 294, n.2 ("We think it beyond controversy that *Boykin v. Alabama* . . . applies to juvenile adjudications.")

Under *Boykin*, the validity of a plea is governed by the totality of the circumstances. In order for a child to make a proper choice and enter a knowing, intelligent and voluntary plea he must be informed of the consequences of his admission of guilt. Children must still be informed of the constitutional rights that they are waiving, and the range of possible punishments.

In order for an admission to be valid the child must also be advised regarding the possible range of punishments, including that they may be subject to detention in the future if they violate the court's orders. The child must be fully informed of all the possible CONSEQUENCES of his admission in order to enter into a valid plea. The court must inform the child of such consequences for an admission to survive *Boykin*. Thus, if the trial court does not appoint counsel, the trial court will have to essentially stand in the shoes of defense counsel and advise the child of all future consequences. *D.R.* requires a proper colloquy pursuant to *Boykin*, and courts are still required to engage in the necessary colloquy as *D.R.* is premised on sound constitutional principles.

II. *D.R.* Still Applicable to Admission Made Prior to HB 146

A. Retroactive Effect of *D.R.*

It is important to note than *D.R.* can still be used to benefit the many children who in the past have entered uncounseled admissions prior to the amendment of KRS 610.060. If you have any child who is impacted by a prior uncounseled admission entered into before the new law was passed, you should use *D.R.* to argue that the admission is invalid. This is particularly useful in transfer cases and contempt hearings. This issue may be relevant when the child is subject to transfer due to a prior public offense where the child admitted without counsel, such as cases that are subject to KRS 635.020 (3). Defense should request that the court not consider any prior uncounseled admissions on the grounds that they were void *ab initio*. Status offenders can benefit from the *D.R.* decision if they admitted prior to the amendment when they are subject to contempt at a later date. These clients are covered under *D.R.* as their admissions were also void *ab initio*. Juveniles in these cases have not had the benefit of counsel, and generally have no idea of the future consequences of their admissions.

B. Recusal In *D.R.* Reversals

Recusal is warranted when there is a showing of facts of a character calculated seriously to impair the judge's impartiality and sway his judgment. *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879, 882; *Foster v. Commonwealth*, Ky., 348 S.W.2d 759, 760 (1961), *cert. denied*, 368 U.S. 993, 82 S.Ct.

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613, 7 L.Ed.2d 530 (1962); *see also Johnson v. Ducobu*, Ky., 258 S.W.2d 509 (1953); KRS 26A.015(2)(a, e); SCR 4.300, Code of Jud.Conduct, Canon 3, subd. C(1).

Canon 3 C(1) of SCR 4.300 provides, in part, that "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned...." According to 26A.015 (2) Any justice or judge of the Court of Justice ... shall disqualify himself in any proceeding:

> (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

KRS 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party ... " or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e); *see* SCR 4.300, Canon 3C(1)

The defendant must go beyond just alleging the mere belief that the judge will not afford a fair and impartial trial. *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995). However, since judges in these kinds of *D.R.*/no counsel/admission cases have already taken the child's admission it is impossible to say that they would be impartial — the judge has already determined the primary issue before the court, that of innocence or guilt. Thus, recusal under the above standard is warranted. A denial of a motion to recuse is appealable, and would be reversible error under the above standards in these *D.R.*/no counsel/admission cases.

Conclusion

Your child's right to counsel is an important tool in the effort to protect a juvenile client's rights. This new legislation gives us more opportunities to protect our juvenile clients' liberty interests. ■

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Kentucky Legislature Provided More Reasonable Options for Sentencing Youthful Offenders

Several years of effort on behalf of youthful offenders bore fruition this past legislative session. Kentucky's youthful offender sentencing statute presented significant and unnecessary challenges to advocates for youthful offenders in circuit court. When a youthful offender turns eighteen, s/he is to be returned to the sentencing court for a consideration of one of three options. These options included probation, commitment to the Department of Corrections or a return to the Department of Juvenile Justice for six more months, then release of the defendant. Needless to say, these options presented unnecessary risks to the sentencing judge. A judge might believe that a defendant is not yet ready for probation and could benefit from additional treatment in the custody of DJJ but also believe that the defendant should not then be free and clear of supervision at the end of those six months. Facing this dilemma, a circuit court sentencing judge had to gamble. The Department of Juvenile Justice, through its Juvenile Justice Advisory Board recommended legislative changes that would permit a sentencing judge to remand an eighteen year old to the custody of DJJ for six months and then return that defendant to the court for further consideration of the remaining sentencing options: probation or commitment to the Department of Corrections. DJJ has sought this amendment to KRS 635.020 for the past four years. The agency was successful this past spring.

The Kentucky Legislature has made the youthful offender sentencing options available to a circuit court judge more reasonable in three aspects. First, a judge may remand all eighteen year olds, including those automatically transferred on a firearm offense, to the custody of DJJ for six months with a review by the court to follow those additional six months. The options at the time of this second review will be probation or commitment to DOC. Secondly, additional amendments to KRS 640 permit DJJ to then determine with DOC if those youthful offenders committed to DOC should remain in the custody of DJJ until they reach the age of twenty-one. Thirdly, any youthful offender sentenced to DOC, may after serving a minimum of twelve months of his sentence, petition the circuit court for reconsideration of probation or may seek early parole eligibility if not prohibited by KRS 439.3401. With these amendments, the legislature has opened the door to more reasonable sentencing options for youthful offenders. ■

Alternatives to Detention for Youth

Rebecca DiLoreto

The Department of Juvenile Justice (DJJ) has implemented a program to help assure that children who would benefit from alternative to detention placements are properly identified and placed in appropriate facilities. Recently DJJ has opened additional detention facilities. In order to avoid the use of detention in these facilities and lower the number of children who are sent to detention (an anticipated unintended consequence of having more facilities) DJJ has also put in place a range of alternatives to detention, and has trained Detention Alternative Coordinators ("DACs") to identify the children that should not be detained and which instead should be placed in less restrictive environments. The Department has the statutory authority to screen and place youths other than those charged with serious offenses into an alternative program.

Kentucky Statutes specify that after a detention hearing if the court orders the child detained:

1. And child is charged with a capital offense, Class A or Class B felony, detention shall occur in either a secure juvenile detention facility or a juvenile holding facility. KRS 610.265 (2)(b)(1).
2. Any other child ordered to be detained in a state-operated facility pursuant to the statewide detention plan, shall be referred to the DJJ for a security assessment and placement in an approved detention facility or program pending the child's next court appearance. KRS 610.265 (2)(b)(6)

Thus, youths that are not charged with Class A or Class B felonies are assessed by DJJ to determine if they are appropriate candidates for placement that is less restrictive than a secured detention facility. This process is undertaken by the DAC assigned to that region. The DAC uses several criteria-based risk assessment instruments. These instruments have been based upon national models. DJJ staff apply the assessment scale to determine which juveniles are appropriate for a non-secure custody option.

Initially, alternative programs have focused on less restrictive out of home care including shelter and foster care. DJJ expects to expand their programs to include day/evening reporting centers, and home detention with or without electronic monitoring.

Objectives Of Custody Continuum:

DJJ provides different custody alternatives that are less restrictive which DJJ refers to as a "custody continuum." The objectives of proper placement are:

- To provide community based programming for non-violent, at-risk juveniles that will effectively protect the community and reserve secure detention resources for violent, serious offenders.
- To ensure the juvenile's arrest free return to court using a less restrictive form of community supervision which is comparably as effective as secure detention.
- To prevent unnecessary disruptions of a juvenile's school and family life.
- To prevent non-violent juveniles from exposure to more sophisticated, delinquent youths.
- To begin assessments/interventions that will facilitate a successful disposition of the youth's case if youth is later adjudicated on the charges.
- To eliminate the use of secure detention for other than public safety reasons including youth has an unsuitable home, parent's refuse to assume responsibility, or parents cannot be located.
- To provide cost effective options, preventing future need to construct costly detention centers.

Program Design

DACs are required to use specific assessment tools and consider the relevant information when reviewing the child's case and whether an alternative to secured detention is appropriate. The DAC's recommendation may override the court's order that the child be detained. The child is expected to abide by specific conditions while in this alternative placement.

- If youth is ordered detained at detention hearing DJJ screens youths using a risk assessment evaluation tool. If youth scores as suitable for a custody option other than secure detention a decision is made as to which option is most suitable based upon youth and family's circumstances.
- Youths may step up or step down the custody continuum based upon compliance or non-compliance with programs. A youth can begin detention in secure setting, be moved to a shelter setting, and finally be placed on home detention. Likewise, a youth placed on home detention that fails to keep the conditions may be placed back in secure detention. An administrative hearing is conducted but a court hearing is not required.
- Youths in any custody option may be tested for use of controlled substances during the entire period of program participation.
- Although judicial permission is not required judges will be kept notified when a youth pending disposition is placed into an alternative program. Judicial approval is required to place a youth sentenced to detention as a disposition into an alternative program.
- Youths will be given conditions in writing at time of placement into a detention custody option.

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The alternatives to detention programs became fully operational in mid August 2001. This was shortly after the opening of two new facilities in McCracken and Campbell counties. DJJ states that thus far the program has shown that youths can be successfully diverted from secure custody without jeopardizing public safety.

For more information, including DJJ policy recommendations and assessment tools defense attorneys may contact the JAIBG Coordinator at the Department of Public Advocacy, Suzanne A. Hopf, e-mail at shopf@mail.pa.state.ky.us

FACILITY BASED DETENTION ALTERNATIVE COORDINATORS

Adair Regional Juvenile Detention Center
Norm Townsel, Superintendent
GaVon Antle, Detention Alternatives Coordinator
401 Appleby Drive
Columbia, Kentucky 42728
Tel: (270) 384-0811; Fax (270) 384-0073
Pager: (270) 634-8043 / E-mail: gwantle@mail.state.ky.us
Counties served: Adair, Casey, Clinton, Cumberland, Green, Metcalfe, Monroe, Russell, Taylor, and Green.

Breathitt Regional Juvenile Detention Center
Doug Wilson, Superintendent
Glenn Turner, Detention Alternatives Coordinator
2725 Kentucky Highway 30 West
Jackson, Kentucky 41339
Tel: (606)295-2350; Fax (606) 295-2399
Pager: (606) 666-1974 / E-mail: tgturner@mail.state.ky.us
Counties served: Breathitt, Estill, Floyd, Knott, Lee, Leslie, Letcher, Magoffin, Menifee, Montgomery, Morgan, Owsley, Perry, Pike, Powell, and Wolfe.

Campbell Regional Juvenile Detention Center
Gary Taylor, Superintendent
Keith Bales, Detention Alternative Coordinator
590 Columbia Street
Newport, Ky 41071
Tel: (859) 292-6371: Fax (859) 292-6478
Pager: (513) 249-8831 / E-mail: kkbales@mail.state.ky.us
Kristi Wells, Detention Alternative Coordinator
Home: (859) 689-5807 / E-mail: Kdwells1@mail.state.ky.us
Counties served: Boone, Bracken, Campbell, Carroll, Gallatin, Grant, Harrison, Henry, Kenton, Oldham, Owen, Pendleton, Robertson, and Trimble

McCracken Regional Juvenile Detention Center
Chuck Seidelman, Superintendent
Ruth Elliot, Detention Alternatives Coordinator
501 County Park Road
Paducah, Ky 42001
Tel: (260) 575-7114; Fax (270) 575-7130
Pager 800.841.7243 pin 32229
E-mail: raelliot@mail.state.ky.us
Counties Served: Ballard, Caldwell, Calloway, Carlistle, Christian, Crittenden, Graves, Fulton, Hickman, Hopkins, Livingston, Lyon, Marshall, Trigg, McCracken, Union, and Webster.

Warren Regional Juvenile Detention Center
Bruce Jennings, Superintendent
Robert Turner, Detention Alternatives Coordinator
P.O. Box 1250
Bowling Green KY 42102-1250
Tel: (270) 746-7155; Fax: (270) 746-1765
Pager 1-800-928-2337 PIN: 037
E-mail: rhturner@mail.state.ky.us
Counties served: Henderson, Daviess, Hancock, McLean, Ohio, Muhlenberg, Butler Edmonson, Todd, Logan, Warren, Barren, Allen, and Simpson.

Community Based Detention Alternatives Coordinators

These DACs are currently assigned to cover certain counties; however, they are a resource for anyone with a question about alternatives for any county that is not currently served by a DJJ operated detention facility.

Margo Figg
Detention Alternatives Coordinator (Community Based DAC)
P. O. Box 849
804 Main Street
Shelbyville, Kentucky 40066
Tel: (502) 633-6326; Fax: (502) 633-2908)
Pager (800) 999-2220 pin 0891/ Cell (502) 396-1040
E-mail: mlfigg@mail.state.ky.us
Counties served: Anderson, Franklin, Scott, Shelby, Woodford

Wade Carpenter
Detention Alternatives Coordinator (Community Based DAC)
P.O. Box 54226
1350 New Circle Rd., Suite 300
Lexington, Kentucky 40555-4226
Tel: (859) 264-8796; Fax: (859) 264-9957
Pager (800) 999-2220 pin 3902 / Home (859) 296-2553
E-mail: wacarpen@mail.state.ky.us
Counties served: Fayette, Jessamine, Clark

Division of Placement Services Director

Vicki Reed
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Juvenile Sentencing Cases

U.S. Supreme Court

U.S. v. R.L.C., 503 U.S. 291 (1992)
The Supreme Court held that the maximum sentence, which may be imposed for a juvenile, may not exceed the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult. If any ambiguity about a sentencing statute's intended scope survives after analysis of its legislative history, construction yielding the shorter sentence must be chosen under the rule of lenity.

Kentucky

Gourley v. Commonwealth, Ky. App., 37 S.W.3d 792 (2001)
The Court of Appeals held that an improper order that the Division of Probation and Parole rather than the Department of Juvenile Justice prepare a pre-sentence investigation report for a juvenile offender was prejudicial. This duty must be performed by the Department of Juvenile Justice in cases involving youthful offenders. KRS 640.030.

Darden v. Commonwealth, Ky., 52 S.W.3d 574 (2001)
The Kentucky Supreme Court held that unlawful possession of a firearm on school property did not constitute use of that firearm for purposes of the automatic transfer statute under KRS 635.020(4).

Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998)
The Kentucky Supreme Court held that juveniles transferred to the circuit court based on the use of a firearm in the commission of a felony are to be considered "youthful offenders," eligible for ameliorative sentencing provisions of KRS 640.040.

Commonwealth v. W.E.B., Ky., 985 S.W.2d 344 (1998)
The Kentucky Supreme Court held that a juvenile public offender may not be committed to a secure juvenile detention facility for more than 90 days, even if the offender is charged with multiple incidents of criminal behavior. KRS 635.060(5)

Johnson v. Commonwealth, Ky., 967 S.W.2d 12 (1998)
The Kentucky Supreme Court held that a statute which declares that youthful offenders shall be subject to the same probation procedures as adults authorized the trial court to deny probation pursuant to a general probation statute requiring the court to consider whether probation would unduly depreciate the seriousness of the crime.

Commonwealth v. Taylor, Ky., 945 S.W.2d 420 (1997)
The Kentucky Supreme Court ruled that a convicted juvenile sexual offender committed to the Cabinet for Human Resources and returned to the sentencing court when he reached the age of twenty-one, was barred from receiving probation. KRS 532.045(2), KRS 640.030

Mullins v. Commonwealth, 956 S.W.2d 222 (1997)
The Court of Appeals held that the violent offender statute, which specifically limits parole by the executive branch, is not intended to limit the judicial branch's consideration of probation. KRS 439.3401. Additionally, the provision stating that offenders fourteen to seventeen years of age who commit a felony are to be treated as adults for all purposes related to that crime means that a juvenile who qualifies as an adult offender is subject to the same penalties as an adult convicted of manslaughter, first degree, but mentally ill. KRS 635.020(4).

Canter v. Commonwealth, Ky., 843 S.W.2d 330 (1992)
Where a juvenile who had been charged with a capital offense was transferred to Circuit Court as a youthful offender where she was acquitted on the capital charge, and convicted of a Class C felony, the trial court was without authority to sentence her pursuant to KRS 640.030, but was limited to the much more lenient dispositions provided by KRS 635.060.

Jefferson County Department for Human Services v. Carter, Ky., 795 S.W.2d 59 (1990)
The Kentucky Supreme Court held that the juvenile court did not have the authority to sentence an eighteen year-old defendant to confinement in a juvenile facility for a car theft committed prior to the defendant's eighteenth birthday. ■

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DNA Testing May Exonerate Defendant: Kentucky's Innocence Project's Work Could Free Man Convicted Of Rape

Frankfort, Kentucky, June 10, 2002. A motion for a new trial based on newly discovered evidence has been filed in Franklin Circuit Court in the case of *Commonwealth v. Herman Douglas May*. Mr. May was convicted of rape and sodomy and sentenced on October 13, 1989 to twenty years imprisonment. He has spent the last 12 years of his life incarcerated. Department of Public Advocacy Attorney Marguerite Thomas filed the motion on behalf of Mr. May on June 7, 2002 seeking a new trial and asserting that DNA test results "absolutely exclude the Defendant as the source of the semen and therefore absolutely excludes him as the man who attacked the victim in May, 1988." The motion was heard on June 21, 2002 in Franklin Circuit Court. The Commonwealth has been permitted to test the evidence.

The Kentucky Innocence Project is a program of the Department of Public Advocacy that was established in September, 2000. The Kentucky Innocence Project functions within the Post-Conviction Branch of DPA and Ms. Thomas is the Manager of the Post-Conviction Branch. Students from the University of Kentucky College of Law and the Northern Kentucky University, Chase College of Law work with the Kentucky Innocence Project as interns. Students from both schools have been involved with the investigation of the May case.

The Kentucky Innocence Project has also been the recipient of an Interest on Lawyers' Trust Accounts Fund (IOLTA) grant from the Kentucky Bar Association. The grant funds were designated to be used for DNA tests for clients of the Kentucky Innocence Project and it was the IOLTA grant funds that provided the source for the testing that excludes Herman May.

Public Advocate Ernie Lewis commenting on the developoments in the May case said, "Kentuckian William Gregory's release indicated that there were indeed innocent men in Kentucky's prisons whose cases needed review. The establishment of the Kentucky Innocence Project in the Post-Conviction Branch of the Department of Public Advocacy occurred precisely because of my belief that there are many others like William Gregory who were innocent and who were convicted because of bad eyewitness identification procedures, unreliable forensic evidence, and other tactics and procedures that have no place in our criminal justice system. The Herman May case is further indication that we are on the right track. The Kentucky Innocence Project is a vital part of the Department of Public Advocacy's quest for justice for innocent inmates."

Criteria for consideration by KIP is substantial:

- Kentucky conviction and incarceration;
- Minimum 10 year sentence;
- Minimum of 3 years to parole eligibility OR if parole has been deferred, a minimum of 3 years to next appearance before the parole board; and
- New evidence discovered since conviction or that can be developed through investigation.

If an inmate's case satisfies all the four criteria, he or she is sent a detailed 20-page questionnaire for specific information about the case.

DNA testing and challenges of the Innocence Project at Cardoza Law School led by Barry Scheck and Peter Neufeld have demonstrated there are in prison those that are inno-

The Kentucky Innocence Project: Top, L-R: Gordon Rahn, Debbie Baris, Tom Williams, Steve Florian, Prof. Mark Stavsky Bottom, L-R: Alexandria LuSans-Otto, Marguerite Thomas, Diana Queen, Beth Albright

cent. DNA has exonerated 105 people in the past few years. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%. Scheck and Neufeld in their book, *Actual Innocence* (2000) list the factors they found led to wrongful convictions:

1) Mistaken eyewitness identification;
2) Improper forensic inclusion;
3) Police and prosecutor misconduct;
4) Defective and fraudulent science;
5) Unreliable hair comparison;
6) Bad defense lawyering;
7) False witness testimony;
8) Untruthful informants;
9) False confessions.

Race plays a role in this process. Scheck and Neufeld reported in *Actual Innocence* that the race of the exonerated defendants was: 29% Caucasian; 11% Latino; and 59% African American.

George F. Will in an April 6, 2000 Washington Post review of *Actual Innocence* recognized the importance of wrongly convicting the innocent and the affect of *Actual Innocence* when he said, "It should change the argument about capital punishment...You will not soon read a more frightening book... Heartbreaking and infuriating." The Sunday, Sept. 15, 2000 Boston Globe said of *Actual Innocence*, "One of the most influential books of the year...shocking…compelling…an objective reference for partisans of all stripes."

Americans want the wrongly convicted to be able to prove their innocence with scientific testing. A Gallup poll, conducted March 17-19, 2000 finds "that 92% of Americans say those convicted before the technology was available should be given the opportunity to submit to DNA tests now — on the chance those tests might show their innocence. Support for this position runs solidly across all demographic groups, as well as all political ideologies…. Mark Gillespie, "Americans Favor DNA 'Second Chance' Testing for Convicts: Nine in ten Americans support genetic testing to resolve long-held claims of innocence," GALLUP NEWS SERVICE, http://www.gallup.com/poll/releases/pr000601b.asp.

To date, 110 men have been released from prison across the nation due to new evidence discovered through DNA testing. ■

Appalachian School of Law

Gill Pilati

The Appalachian School of Law's newly founded Law School, in Grundy, Virginia, and serving Central Appalachia, has placed (due to the extraordinary efforts of Rose Turley, Career Services Director) three law students – volunteering to serve with DPA's Summer Intern Program in the under-served areas of Pikeville, Hazard and Henderson.

A hearty welcome with deep appreciation goes to Appalachia's Law Clerks: Louis Conner, Pikeville Office; Scott Smith, Henderson Office; and, Megan Stidham, Hazard Office.

If you are interested in employment with DPA, contact me:

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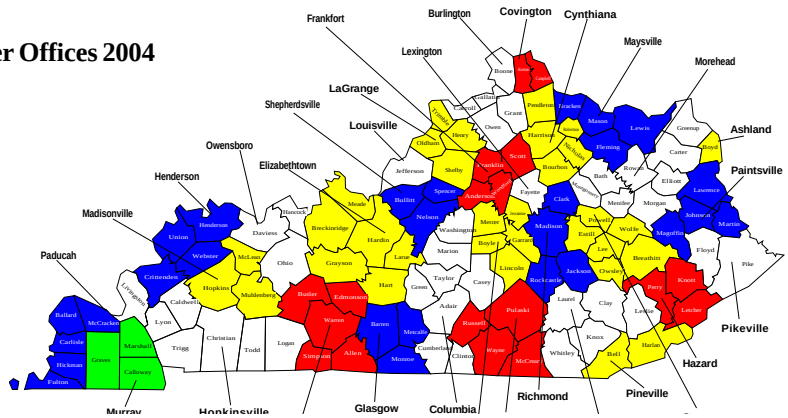


PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

Motion for Directed Verdict Must be Made at the Close of the Commonwealth's Case and the Close of All the Evidence.

To properly preserve a motion for directed verdict, the motion must be made at **both** the close of the Commonwealth's proof and the close of all the evidence. This rule applies whether or not the defense presents any evidence in its case in chief or not. So to be safe, always renew the motion for directed verdict after you have rested the case for the defense, and move for directed verdict a third time if the Commonwealth presents rebuttal evidence. This insures the motion and ruling appears on the record at the close of the Commonwealth's case and the close of all the evidence as required pursuant to *Baker v. Commonwealth*, 973 S.W.2d 54 (Ky. 1998). Otherwise, failure to properly preserve a directed verdict issue will result in it not being reviewed by the appellate courts.

~ Dennis Stutsman, Appeals Branch Mgr., Frankfort

Include Case Citations on Record to Preserve Issue and Avoid Confusion on Appeal

When citing to a case as authority in an oral motion, always remember to provide the case name and citation. This is especially true for cases involving very common sir names, such as Smith or Johnson that are being cited to support highly litigated issues, such as hearsay or PFO issues.

Always stating the case citation serves two purposes. First, citations help clarify the record and provide easy access to the authority you are relying on for your argument. Second, clear citations protect against the Commonwealth arguing that the unclear record fails to properly preserve the issue or arguing a different case with same name to our client's disadvantage.

~ Linda Horsman, Appeals Branch, Frankfort

***Commonwealth V. Philpott* Requires New Penalty Phase Procedures**

The Kentucky Supreme Court now requires any trial in circuit court that results in any conviction to have a penalty phase. First, the trial court should instruct on guilt/innocence alone – no sentencing instructions, not even on misdemeanors. Second, the jury should deliberate and return a verdict. Third, if the jury returns with a guilty verdict on a misdemeanor, the court should permit arguments by counsel as to penalty but should not take new evidence. Fourth, the court should instruct the jury on misdemeanor penalties alone. Fifth, the jury should deliberate and return a verdict. Sixth, if the jury has returned a guilty verdict on any felonies, the court should instruct on the penalties and hold the truth-in-sentencing/persistent felony offender proceedings. Seventh, counsel should argue penalty. Last, the jury should deliberate and return a verdict. See *Commonwealth v. Philpott*, Ky., __ S.W.3d ___, 2002 WL 1000905 (2002).

~ Euva Hess, Appeals Branch, Frankfort

Always Double Check the Record on Appeal to Make Sure it is Complete

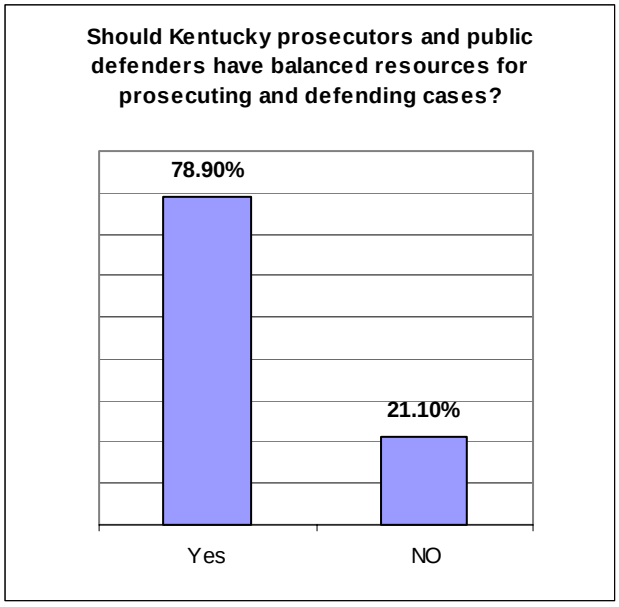
Great inconsistency exists between circuit courts regarding what is included on the record on appeal. For example, some clerks always include the jury strike sheets in the record, while others do not include the sheets.

Trial attorneys should always check the record to ensure that it is complete, or always request of the clerk that certain items be included in the official record. This is especially true for items that may be necessary for issues on appeal, such as jury strike sheets, defense tendered jury instructions, PSI reports, copies of prior convictions, and preliminary hearing testimony or other items used for impeachment.

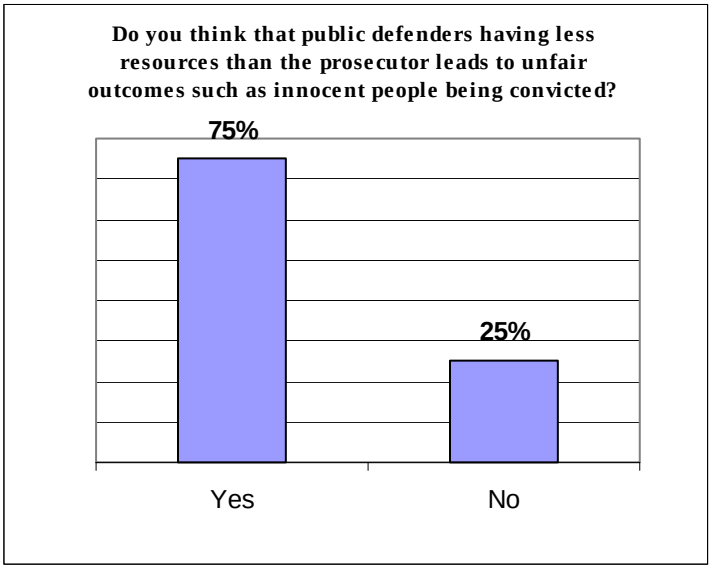
~ Linda Horsman, Appeals Branch, Frankfort

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

8 Out Of 10 Kentuckians Want Public Defenders and Prosecutors to Have Balanced Resources



75% of Kentuckians Fear Less Resources For Defenders Leads to Risk of Innocent Being Convicted



Results of *Spring 2001 Kentucky Survey* with 841 interviews completed between July 13 until September 7, 2001 by the University of Kentucky Survey Research Center. The margin of error is approximately ± 3.4 percentage points at the 95 percent confidence level.

THE ADVOCATE

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For more information regarding KACDL programs call or write: Denise Stanziano, 184 Whispering Oaks Drive, Somerset, Kentucky 42503, Tel: (606) 676-9780, Fax (606) 678-8456, E-mail: KACDLassoc@aol.com

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For more information regarding NLADA programs call Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006;
Web: http://www.nlada.org

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For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

**** NLADA ****

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